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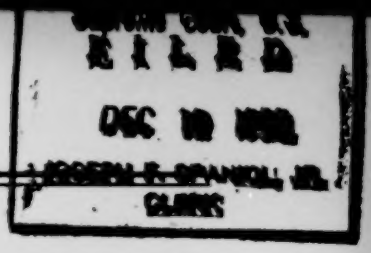

IN THE

Supreme Court of the United States

October Term, 1990

RICHARD BIAGGI,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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(5593—LC2-655)

QUESTION PRESENTED

Whether, in a case in which a previously immunized grand jury witness, whose immunized testimony receives massive publicity through the media, is later indicted for events relating to his immunized testimony, the Fifth Amendment permits a trial judge to find that the Government has met its "heavy burden" and "affirmative duty" to show lack of taint by relying on the trial proof without holding a hearing of any kind.

PARTIES

All of the parties to the proceeding in the United States Court of Appeals for the Second Circuit were the petitioner, Stanley Simon, Mario Biaggi, Peter Neglia, John Mariotta and Bernard Ehrlich. None of the latter five are interested in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

A copy of the opinion of the United States Court of Appeals for the Second Circuit, decided June 29, 1990, is annexed hereto in the appendix. The District Court issued two opinions

relevant to this petition. They are *United States v. Biaggi*, 675 F.Supp. 790 (S.D.N.Y. 1987), and *United States v. Biaggi*, 705 F.Supp. 864 (S.D.N.Y. 1988).

JURISDICTION

(a) The judgment of conviction was rendered November 18, 1988, convicting petitioner of aiding and abetting bribery, mail fraud and making false statements on tax returns in violation of Title 26 U.S.C. §7206, after a trial by jury on a fourth superseding indictment.

(b) The judgment of affirmance on the tax charges of the United States Court of Appeals for the Second Circuit is dated June 29, 1990. Petitioner's convictions on

all charges other than the tax charges were reversed for insufficient evidence.

(c) The order of the United States Court of Appeals for the Second Circuit denying the petition for rehearing of petitioner's co-appellant, Mario Biaggi, is dated September 10, 1990 (Appendix). The 90-day period within which to file a Petition for a Writ of Certiorari runs from September 10, 1990.

(d) Jurisdiction to review the judgment in question by certiorari is conferred by Title 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

In the fall of 1986 the New York County District Attorney's Office ("the DA") and the United States Attorney for the Southern District of New York ("the SDNY") were investigating whether officials of the Wedtech Corporation ("Wedtech") had, among other crimes, bribed public officials, including General Vito Castellano of the New York State National Guard, to obtain Government business for Wedtech. In connection with these investigations, petitioner, Richard Biaggi, appeared before a New York County Grand Jury on December 11, 1986 pursuant to a grant of transactional immunity. This grant of immunity was approved by the SDNY, which had an agreement with the DA that each would obtain the approval of the other before granting immunity to anyone. Petitioner testified at length with respect

to efforts by Wedtech and his law partner, Bernard Ehrlich, to pay Castellano through a company known as Portatech, which Petitioner controlled, and identified and explained documents relating to this plan. He also testified before the grand jury to another bribery scheme pursuant to which Ehrlich, who was himself a General in the New York National Guard and thus also a public official, was bribed through Portatech by former Bronx County Democratic Chairman, Stanley Friedman, on behalf of Citisource, Inc. The SDNY was cross-designated to receive information from the state grand jury and the DA relating to this investigation, and federal and state prosecutors were sharing information and evidence at this time, as well as exchanging documents.

Petitioner's immunized testimony led directly to the New York County indict-

ment of Ehrlich on January 15, 1987, followed the next day by massive media publicity of petitioner's cooperation, testimony and involvement in these schemes, including radio and television reports, and newspaper articles in the New York Times, New York Daily News and New York Post. Federal prosecutors and the grand jurors in the SDNY, who later indicted petitioner, Bernard Ehrlich and Mario Biaggi for RICO bribery charges involving Wedtech as the enterprise and Castellano's efforts to assist Wedtech in obtaining Government contracts, were exposed to these media reports, which encompassed the substance of petitioner's immunized testimony. Witnesses who testified before the grand jury and who later testified at trial were exposed to this publicity.

Petitioner's testimony also led directly to the guilty pleas and cooperation

of various Wedtech officials in both state and federal court for the bribery of Castellano as well as other offenses. These Wedtech officials became Government witnesses and later gave testimony against petitioner, for which petitioner was indicted on June 3, 1987. In other words, petitioner's immunized testimony directly led to the cooperation of those who testified against him.

On these facts, petitioner moved prior to trial for an order directing the Government to prove at a hearing that it did not use, directly or indirectly, his immunized testimony against him. Petitioner claimed that the Government intended to use against him evidence derived indirectly from the immunized testimony. Petitioner also claimed that his immunized testimony caused the cooperation of officials of Wedtech who, in turn, began to testify against petitioner.

The Government opposed a hearing. It relied upon hearsay affidavits of a prosecutor and the former Wedtech officials who became Government witnesses in which these witnesses stated that they began to cooperate as a result of pressure placed on them by federal authorities, not state prosecutors. These affidavits, including the ones submitted by the prosecutor, were riddled with inconsistencies, contradicted by numerous conceded facts and actually contained admissions by the prosecutor that petitioner's testimony was used against him. In spite of this the trial court refused to grant a pretrial evidentiary hearing on this issue, reserving the issue for post-trial determination.

During petitioner's subsequent trial, the Government introduced abundant proof which related to his immunized testimony,

including Ehrlich's and Castellano's efforts on behalf of Wedtech, which were triggered by the payments about which petitioner testified under compulsion. The Government also insisted on cross-examining petitioner with respect to his involvement in Wedtech's bribery of Castellano through Portatech, which was one of the exact subject matters of petitioner's immunized testimony. As a result of the Government's expressed intention to question petitioner about the subject of his immunized testimony, he declined to testify. The Government, however, did cross-examine petitioner's wife with respect to petitioner's involvement with Portatech and Wedtech and actually used a document it had gotten from the DA for this purpose, which petitioner had testified about in the grand jury. Moreover, many other records which the Government introduced into evidence at

trial were obtained by the SDNY from the DA, which the DA acquired pursuant to the investigation in which petitioner testified. Finally, the Government proved that Ehrlich was so conscious of his guilt in December 1986 that he contemplated flight from prosecution and suicide, and the Government then admitted on the record that Ehrlich's depression was due to his awareness of petitioner's immunized testimony against him (Ehrlich) in the state grand jury on December 11, 1986. Thus the Government knowingly proved against petitioner conspiratorial acts which were triggered by his own immunized testimony.

In refusing to grant a post-trial hearing on the issue of whether petitioner's testimony was directly or indirectly used against him, the judge relied upon the trial testimony, claiming

that the trial testimony made clear that there was no tainted evidence admitted or used. Neither the trial judge nor the Court of Appeals, which affirmed the trial court's refusal to conduct a hearing, ever addressed how the trial proof could reveal a taint problem. Nor did the lower courts address the issue of possible taint in the grand jury because of the massive publicity relating to petitioner's immunized grand jury testimony.

REASONS FOR GRANTING THE WRIT

POINT ONE

THE TRIAL COURT IMPROPERLY DENIED PETITIONER A HEARING AT WHICH THE GOVERNMENT WAS REQUIRED TO PROVE THAT ITS CASE WAS NOT TAINTED.

In *Murphy v. Waterfront Commissin of New York*, 378 U.S. 52, 79, n.18 (1964) the Court stated:

> "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence."

Subsequently, in *Kastigar v. United States*, 406 U.S. 441 (1972), the Court, citing this language, held as follows:

> "This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.
>
> * * *
>
> One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." Id. at 461-62.

In view of these authorities, it was error for the trial court to refuse to hold a hearing in this case and require the Government to meet its "heavy burden" of proof. There was simply no way the Government could meet its burden of showing lack of taint by the trial proof. The trial testimony could have been based upon, directly or indirectly, petitioner's immunized testimony, which was publicly reported prior to petitioner's indictment. It was not for the petitioner to prove the case was tainted. It was for the Government to prove it was not.

The Government conceded here that prior trial there were exchanges of information and documents between the state prosecutor who immunized petitioner and the federal prosecutor who prosecuted him. Indeed, the federal prosecutor actually approved his immunity grant based

on an agreement between the prosecutors' offices. When this conceded fact is combined with the introduction of evidence at the federal trial which was identical to portions of the immunized testimony, the need for a hearing on this issue was plain.

The Court of Appeals' analysis of this issue was faulty. While the Court of Appeals noted that the Government established an independent basis for one document that it used at trial to cross-examine petitioner's wife, the Court did not note that the Government's position on this below was hotly contested by petitioner. Moreover, the Government was required to show an independent basis for all the proof adduced at trial, not merely one document. Kastigar and Murphy would lose their effectiveness if the Government

were permitted to meet their burden by simply assuring the trial court, unilaterally, that all is well, which is what occurred here.

POINT TWO

PETITIONER ADOPTS THE ARGUMENTS AND POINTS OF HIS CO-APPELLANT TO THE EXTENT THEY ARE APPLICABLE TO HIM.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America, Appellee,

v.

Mario BIAGGI, Stanley Simon, Richard Biaggi, Peter Neglia, John Mariotta, and Bernard Ehrlich, Defendants-Appellants.

Nos. 35, 24, 25, 26, 27, 23, Dockets 88-1530, -1531, -1532, -1533, -1543, 89-1015.

United States Court of Appeals, Second Circuit.

Argued Aug. 28, 1989.

Decided June 29, 1990.

Former United States congressman, his son, his former law partner, former borough president, defense contractor's former chief executive officer, and former regional administrator of Small Business Administration were convicted in the United States District Court for the Southern District of New York, Constance Baker Motley, J., of various offenses arising out of the affairs of defense contractor. The District Court, Motley, J., 705 F.Supp. 864, denied posttrial motions. Defendants appealed. The Court of Appeals, Jon O. Newman, Circuit Judge, held that: (1) jury plan using voter registration list as exclusive source of names of prospective jurors did not violate Fifth or Sixth Amendments; (2)

evidence was insufficient to show that congressman's son knew that shares of stock in defense contractor were issued in return for congressman being influenced to assist defense contractor as congressman; (3) evidence was sufficient to sustain bribery conviction against congressman and others; (4) bribe and false denial of same bribe did not satisfy pattern of racketeering activity element of offense under Racketeer Influenced and Corrupt Organizations Act; and (5) defense contractor's former chief executive officer was denied fair trial when district court excluded evidence of immunity negotiations.

Affirmed in part, reversed in part, vacated in part, and remanded.

1. Indictment and Information ⇐129(4)

Joinder of extortion counts against defendant was permissible, even if standards for severance of counts in multidefendant trial were applicable, and even though victims of extortions were different, where extortions were within "same series of acts or transactions"; defendant used one victim as means of obtaining many benefits derived from another victim. Fed.Rules Cr.Proc.Rule 8(a, b), 18 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

2. Indictment and Information ⇐129(1)

Defendant's tax evasion count was properly joined with extortion counts, where core of tax count was extorted income, even though tax count included a relatively small amount of income from unrelated transaction. Fed.Rules Cr.Proc. Rule 8(a, b), 18 U.S.C.A.

3. Criminal Law ⇐622

Defendant charged with bribery, gratuity, mail fraud, and filing false tax return counts was not prejudiced by his joinder with other defendants charged with core of illegalities regarding payments from defense contractor, even though many alleged illegalities concerned activities of law firm, and defendant had to show his membership in law firm to justify his receipt of stock interest in defense contractor, where even in separate trial much of the evidence concerning activities of law firm and defense contractor would have been admissible to prove circumstances concerning the stock transaction. 18 U.S.C.A. §§ 201(b, c), 1341; 26 U.S.C.A. § 7206(1).

4. Constitutional Law ⇐267
Jury ⇐33(1.3)

Jury plan using voter registration lists as exclusive source of names of prospective jurors did not violate due process, even though use of voter registration lists resulted in underrepresentation of blacks and

Hispanics, where there was no showing that blacks or Hispanics had been hindered in registering to vote. U.S.C.A. Const. Amend. 5.

5. Jury ⇐33(1.1)

Discriminatory intent is not element of claim that jury selection plan violates "fair cross-section" requirement of Sixth Amendment. U.S.C.A. Const.Amend. 6.

6. Jury ⇐33(1.1)

Sixth Amendment assures only opportunity for representative jury, rather than a representative jury itself.

7. Jury ⇐33(1.3)

Jury selection plan based on voter registration lists did not violate Sixth Amendment's "fair cross-section" requirement, even though plan resulted in underrepresentation of blacks and Hispanics. U.S.C.A. Const.Amend. 6.

8. Jury ⇐33(1.3)

Jury selection plan based on voter registration lists did not violate Jury Selection and Service Act, although plan resulted in underrepresentation of blacks and Hispanics. 28 U.S.C.A. §§ 1861–1869.

9. Jury ⇐33(5.1)

Prosecution's explanations for its challenges to four of six potential Hispanic jurors and five of six potential Italian-American jurors were neutral and not pretextual, and satisfactorily rebutted claim of discrimination.

10. Jury ⇐117

Batson objections should be entertained and adjudicated during process of jury selection.

11. Jury ⇐117, 118

District court's preference for written motions in complex trial must give way to the need to resolve *Batson* claim at point where prompt corrective action can be taken if claim is successful.

12. Jury ⇐142

District court's postponement of *Batson* inquiry until defendants filed written motion was not ground for complaint by defendants on appeal, where defendants had not objected to requirement of written motion and did not present motion until end of trial.

13. Jury ⇐33(5.1)

Government could not bolster its denial of discrimination in jury selection by showing how closely the ethnic composition of jury resembled that of venire from which it was selected.

14. Jury ⇐33(5.1)

Composition of jury may be relevant to rebutting claim of discrimination by prosecution in jury selection, but pertinent comparison is between jury as selected and racial or ethnic composition of population of judicial district, not composition of venire drawn for particular case; latter might

contain underrepresentation of cognizable group compared to pertinent population.

15. Bribery ⇐11

Evidence was sufficient to show in trial of United States congressman's son for aiding and abetting congressman's commission of bribery and gratuity offenses, based upon defense contractor's grant of stock interest to son, that son was holding stock as nominee for congressman. 18 U.S.C.A. § 201(b, c).

16. Bribery ⇐11

Evidence was insufficient to show, in trial of United States congressman's son for aiding and abetting congressman's commission of bribery and gratuity offenses, that son knew that shares granted to him by defense contractor were issued for congressman's benefit in return for congressman being influenced to assist defense contractor; what little evidence existed as to son's knowledge would only have supported finding that he knew that stock was put in his name to circumvent limits on congressman's outside income. 18 U.S.C.A. § 201(b, c).

17. Internal Revenue ⇐5263.35

United States congressman's son was properly convicted of filing false tax return by overstating his income to include receipt of shares of stock in defense contractor and subsequent profit from their sale.

where evidence showed defendant's knowledge that he only held shares as nominee for his father. 26 U.S.C.A. § 7206(1).

18. Internal Revenue ⇐5263.35

To convict defendant of filing false tax return by overstating his income to include receipt of shares of stock owned by another and subsequent profit from their sale, defendant only had to have knowledge of true ownership of stock, not of unlawful purpose for which stock shares were issued. 26 U.S.C.A. § 7206(1).

19. Criminal Law ⇐1190

Upon reversal of defendant's conviction for aiding and abetting bribery and gratuity, but affirmance of convictions for mail fraud and filing false tax return, defendant was entitled to resentencing, even though defendant had received concurrent sentences for convictions, where district judge may have regarded tax return offenses as aggravated because of their relation to bribery offenses. 18 U.S.C.A. §§ 201(b, c), 1341; 26 U.S.C.A. § 7206(1).

20. Criminal Law ⇐1190

Reversal of conviction on serious charges should afford opportunity for consideration of reduction of sentences on remaining counts, unless sentencing judge's intent to scale sentences according to seriousness of the several offenses is clear.

21. Extortion and Threats ⇐1

Bribery ⇐1(1)

Payment to law firm does not necessarily become unlawful under gratuity, bribery, and extortion statutes because firm used its political contacts to assist its client in matter that requires governmental approvals, in addition to rendering traditional legal services such as negotiating and drafting lease. 18 U.S.C.A. §§ 201(b)(2)(A), (c)(1)(B), 1951(b)(2).

22. Bribery ⇐1(1)

Extortion and Threats ⇐4

Evidence was sufficient to convict defendants of bribery and extortion, even though payment in part had lawful purpose of compensation for legal services rendered by law firm, where payment was also demanded by United States congressman and directed to his son's law firm to obtain congressman's assistance as public official in securing favorable action from other public officials. 18 U.S.C.A. §§ 201(b)(2)(A), 1951(b)(2).

23. Bribery ⇐1(1)

Payment may be found to constitute bribe and extortion where it is sought and paid for both lawful and unlawful purposes. 18 U.S.C.A. §§ 201(b)(2)(A), 1951(b)(2).

24. Criminal Law ⇐22

Valid purpose that partially motivates a transaction does not insulate participants

in unlawful transaction from criminal liability.

25. Extortion and Threats ⇐4

If United States congressman demands payment for taking official action as to matter that requires some legal services, his demand is extortion if he instructs payer to retain his son's law firm for needed services and to pay sum for both firm's legal services and his own official action; in such cases, however, evidence must suffice to permit jury to find beyond reasonable doubt that unlawful purposes were of substance, not merely vague possibilities that might attend otherwise legitimate transaction. 18 U.S.C.A. § 1951.

26. Bribery ⇐1(1)

Client paying his law firm's legal fee does not commit bribery simply because United States congressman is "of counsel" to firm and client hopes that congressman will someday be helpful. 18 U.S.C.A. § 201(b).

27. Bribery ⇐11

Extortion and Threats ⇐15

Evidence was sufficient to show in trial of United States congressman for bribery and extortion that defense contractor's payment of $50,000 to law firm in which congressman was "of counsel" and in which his son was attorney was demanded and paid, at least in part, to obtain congressman's political services; payment fol-

lowed prior extortionate demand by congressman and partner in that law firm, payment was discussed with congressman while matters were pending on which congressman's assistance was urgently needed, law firm's bill to defense contractor was submitted just one week after need for congressman's assistance became apparent, bill was paid the day after governmental action favorable to defense contractor, and bill was not accompanied by normal law firm time records. 18 U.S.C.A. §§ 201(b), 1951.

28. United States ⇐52

Involvement by regional administrator of Small Business Administration in affairs of defense contractor after being promised position at law firm for which defense contractor would partially pay salary violated conflict-of-interest statute, which prohibits public official from participating in matter in which prospective employer has financial interest. 18 U.S.C.A. § 208.

29. Bribery ⇐11

Evidence was sufficient to show in bribery trial of former regional administrator of Small Business Administration that administrator accepted job promise at law firm, in return for being influenced in his duties regarding defense contractor; defense contractor had agreed to pay one half of administrator's salary at law firm, and

d previously rendered un-
to defense contractor. 18
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⊨9

ense could not be used as
establish pattern of racke-
necessary for conviction
r Influenced and Corrupt
ct; gratuity was lesser in-
of bribery, which was also
edicate act. 18 U.S.C.A.
62(c).

⊨10

f statute prohibiting the
statements is not eligible
licate act of racketeering
Racketeer Influenced and
zation Act, as such viola-
ithin the offenses that de-
ng activity." 18 U.S.C.A.
).

⇐7

obstruction of justice offense
use to establish pattern of
tivity under Racketeer In-
Corrupt Organizations Act
sarily mean that it suffices
e. 18 U.S.C.A. §§ 1503,

⇐9, 10

false denial of that same
satisfy pattern of racketeer-

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ing activity requiremen
Racketeer Influenced a
nizations Act. 18 U.S.C

34. Commerce ⇐6

Defendant who both
made false denial of san
be convicted of engagi
racketeering activity in
teer Influenced and Corr
Act, in absence of its a
acts of racketeering acti
§ 1962(c).

35. Criminal Law ⇐11

Reconsideration of
tences imposed for bribe
offenses was warranted,
conviction under Racket
Corrupt Organizations
even though defendant
current terms on bribery
counts. 18 U.S.C.A. § 2

36. Obstructing Justice

Even if "exculpator
applicable to obstruction
doctrine was inapplica
dant's statements to D
fense investigator went
als of wrongdoing, but
manufactured false vers
U.S.C.A. § 1503.

37. Post Office ⇐35(9)

Schemes by defense
mer chief executive offic

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misrepresented his majority interest in corporation before public offering of stock, and made similar misrepresentation with respect to sham stock purchase agreement, deprived victim of money or property, and thus were actionable mail frauds, where schemes deprived Department of Defense of its property right to control award of contracts to socially and economically disadvantaged individuals, even though Department used services of Small Business Administration to administer disadvantaged business program. 18 U.S.C.A. § 1341; Small Business Act § 2[8](a), as amended, 15 U.S.C.A. § 637(a).

38. Criminal Law ⇐1137(7)

Defendant's claim that testimony in trial for extortion and related predicate acts under Racketeer Influenced and Corrupt Organizations Act about June meeting was conclusively refuted by records and photographs had not been preserved at trial; defense counsel had told judge that if Government was going to argue that meeting occurred in June, that was issue of fact for jury, and defendant's motion for directed verdict should be denied. 18 U.S.C.A. §§ 1951, 1961 et seq.

39. Extortion and Threats ⇐15
Racketeer Influenced and Corrupt Organizations ⇐121

Evidence was sufficient to convict former New York borough president of extor-

tion and related predicate acts under Racketeer Influenced and Corrupt Organizations Act in connection with $50,000 payment solicited from defense contractor for charity; borough president had assisted defense contractor in completing lease transaction with city. 18 U.S.C.A. §§ 1951, 1961 et seq.

40. Indictment and Information ⇐159(3)

Government did not constructively amend indictment charging defendant with extortion and related predicate acts under Racketeer Influenced and Corrupt Organizations Act in violation of Fifth Amendment by shifting its focus from June meeting to November meeting; evidence of November demand for payment of money did not constitute modification of essential element of offense. 18 U.S.C.A. §§ 1951, 1961 et seq.; U.S.C.A. Const.Amend. 5.

41. Criminal Law ⇐42

Government established source independent of defendant's immunized grand jury testimony for receiving invoice used to cross-examine defendant's wife concerning her knowledge of her husband's business dealings, where document was obtained pursuant to subpoena issued before defendant's state grand jury testimony.

42. Criminal Law ⇐42

Witnesses' testimony that their decision to cooperate with Government was

influenced not only by prospect of extensive federal prison terms but also by prospect of state prison terms resulting from state grand jury investigation in which defendant gave immunized testimony did not preclude district court from finding that Government's evidence from cooperating witnesses was independent of immunized testimony and that *Kastigar* hearing was not necessary, especially where defendants alleged the witnesses cooperated because they had heard generally about state investigation, rather than by anything that defendants had stated to state grand jury.

43. Criminal Law ⇐351(1)

Evidence that defendant has rejected offer of immunity in exchange for testifying as to wrongdoing is relevant and admissible to show defendant's "consciousness of innocence." Fed.Rules Evid.Rule 401, 28 U.S.C.A.

44. Criminal Law ⇐351(1)

Defendant was denied fair trial due to district court's exclusion of evidence of immunity negotiations with defendant, during which Government had allegedly offered defendant immunity if he would testify regarding wrongdoing by others, and defendant denied knowledge of any such wrongdoing. Fed.Rules Evid.Rule 401, 28 U.S.C.A.

45. Criminal Law ⇐351(1), 1170(1)

District court's exclusion of evidence that defendant had allegedly rejected immunity offer in exchange for testifying as to wrongdoing required reversal of bribery convictions, where evidence that defendant had denied knowledge of unlawful activities of others may have affected jury verdict. 18 U.S.C.A. § 201(b); Fed.Rules Evid.Rule 401, 28 U.S.C.A.

46. Racketeer Influenced and Corrupt Organizations ⇐26

In some circumstances, jury's finding of two predicate acts, lawfully constituting pattern of racketeering activity under Racketeer Influenced and Corrupt Organizations Act, and of other elements of offense under Act, will permit affirmance of conviction under Act notwithstanding invalidation of other predicate acts. 18 U.S.C.A. § 1961 et seq.

47. Racketeer Influenced and Corrupt Organizations ⇐26

Reversal of conviction under Racketeer Influenced and Corrupt Organizations Act was required upon reversal of predicate acts of bribery due to district court's improper exclusion of "state of mind" evidence, even though predicate acts of mail fraud were affirmed, where excluded evidence might have sufficed to persuade jury to find that the two mail fraud offenses did not constitute pattern of racketeering activity. 18 U.S.C.A. § 1961 et seq.

48. Criminal Law ⇐1190

Reversal of convictions for bribery and violation of Racketeer Influenced and Corrupt Organizations Act did not require reconsideration of defendant's sentences on mail fraud and tax evasion convictions, where vacated counts carried sentences far more severe than sentences on remaining counts. 18 U.S.C.A. §§ 201(b), 1341, 1961 et seq; 26 U.S.C.A. § 7201.

49. Criminal Law ⇐1137(6)

Defendant could not contend on appeal that district court erroneously excluded evidence of his state of mind where defendant elected, for understandable tactical reasons, not to press for admission of evidence to show state of mind after Government asserted that admission of state of mind evidence would permit Government to introduce act evidence in rebuttal.

50. Criminal Law ⇐419(2.20)

Evidence as to what defendant's father, who was United States congressman, stated regarding his ownership of stock transferred to defendant by defense contractor, bore only tangential relevance to defendant's state of mind in bribery trial, and thus limitations on admission of such evidence was not error; defendant's wife was permitted to testify to conversations that bore on defendant's state of mind concerning ownership of stock.

51. Criminal Law ⇐627.6(2), 661

In trial of former United States congressman for bribery and extortion relating to defense contractor, district court acted within its discretion in rejecting requests for documents and testimony showing involvement of Attorney General and other officials in obtaining government contracts for contractor, despite congressman's defense that contractor did not need to bribe democratic congressman because contractor already had aid of republican executive branch officials; such documents and testimony would have greatly expanded scope of already wide-ranging trial, defense had been able to establish considerable role played by Attorney General in assisting defense contractor, and prosecution made no attempt to dispute allegations of Attorney General's involvement on behalf of defense contractor or unlawfulness of that involvement.

52. Extortion and Threats ⇐15

Inference of inducement arising in extortion trial from repeated acceptance of substantial benefits does not apply to elected official who may lawfully receive campaign contributions; permitting such inference would subject every recipient of campaign contributions to conviction for extortion. 18 U.S.C.A. § 1951.

53. Extortion and Threats ⇐16

When elected official who has received campaign contributions is charged with ex-

tortion and with receiving bribes, charge must carefully focus jury's attention on difference between lawful political contributions and unlawful extortionate payments and bribes. 18 U.S.C.A. §§ 201(b), 1951.

54. Extortion and Threats ⇐16

To tell jury in extortion trial of elected public official that whether payment is lawful campaign contribution or unlawful extortion or bribe is matter to be resolved based on all evidence in case is insufficient. 18 U.S.C.A. § 1951.

55. Extortion and Threats ⇐15

In trial of public official for extortion, factors that might bear on issue of whether payment is lawful campaign contribution or unlawful extortion or bribe may include whether contribution was reported, whether it was unusually large compared to contributor's normal donations, whether official threatened adverse action if contribution was not made, and how directly the official or those soliciting for him linked contribution to specific action to be taken by official. 18 U.S.C.A. §§ 201(b), 1951.

56. Criminal Law ⇐1172.2

Jury instruction in extortion trial of New York borough president, which permitted inference of inducement from repeated exceptance of substantial benefits, did not warrant reversal of conviction, even

if charge was inappropriate; borough president did not defend on ground that money received was lawful campaign contribution, but on ground that demand was never made and that money was never received or paid on his behalf. 18 U.S.C.A. § 1951.

57. Criminal Law ⇐1043(2)

Generally, the proffer of requested instruction does not excuse defendant from need to object specifically to its omission from charge in order to preserve issue for appeal.

58. Criminal Law ⇐1043(2)

General complaint of failure to give requested instructions might suffice to preserve claim concerning a request fully considered and denied by trial court at charge conference and wholly omitted from charge, but where topic is covered in charge, complaint that charge language incorrectly or inadequately covers the topic must be specifically called to court's attention after charge is given. Fed.Rules Cr. Proc.Rule 30, 18 U.S.C.A.

59. Criminal Law ⇐1038.2

District court's failure to give charge requested by defense in tax evasion trial, that furnishing of labor and materials to taxpayer would not constitute taxable income if taxpayer intended to pay for work done and materials supplied upon completion of work, was not plain error, where there was no reasonable possibility that

verdict on tax count would have been different; district court had made general charge on topic of reportable income. 26 U.S.C.A. § 7201.

60. Bribery ⇐14

Extortion and Threats ⇐16

District court's characterization of defense contention in extortion and bribery trial that stock received was issued in payment for past legal services did not obscure the defense, although defendant contended that stock was compensation for loyalty in general; district court's formulation did not affect substantial rights of defendant, and "loyalty" rationale was not so distinct from motivation of paying for past services that it had to be separately mentioned. 18 U.S.C.A. §§ 201(b), 1951.

James M. LaRossa, New York City (Karen F. Silverman, Arie Bucheister, LaRossa, Mitchell & Ross, New York City, on the brief), for defendant-appellant Mario Biaggi.

Charles Haydon, New York City (Paul A. Victor, Dublirer, Haydon, Straci & Victor, New York City, on the brief), for defendant-appellant Simon.

Dominic F. Amorosa, New York City, for defendant-appellant Richard Biaggi.

Alan R. Kaufman, New York City (Buchwald & Kaufman, New York City, on the brief), for defendant-appellant Neglia.

Jeffrey Glekel, New York City (Albert J. Boro, Jr., Skadden Arps Slate Meagher & Flom, New York City, on the brief), for defendant-appellant Mariotta.

Peter J. Driscoll, New York City (Catherine L. Redlich, Kostelanetz Ritholz Tigue & Fink, New York City, on the brief), for defendant-appellant Ehrlich.

Edward J.M. Little, Asst. U.S. Atty., New York City (Benito Romano, U.S. Atty., Michele Hirshman, Vincent L. Briccetti, Celia Goldway Barenholtz, Asst. U.S. Attys., Mary Shannon Little, Sp. Asst. U.S. Atty., Donna Merris, Law Clerk, New York City, on the brief), for appellee.

Before FEINBERG and NEWMAN, Circuit Judges, and MISHLER, Senior District Judge.*

JON O. NEWMAN, Circuit Judge:

This is an appeal by six defendants, including a former United States Congressman, from convictions arising out of the affairs of the Wedtech Corporation, a manufacturing company located in New York City that received contracts from the Defense Department. The defendants are former Congressman Mario Biaggi; his son, Richard Biaggi; the Congressman's former law partner, Bernard Ehrlich; the former Bronx Borough President, Stanley

* The Honorable Jacob Mishler of the District Court for the Eastern District of New York, sitting by designation.

Simon; the former chief executive officer of Wedtech, John Mariotta; and the former New York regional administrator of the Small Business Administration, Peter Neglia. The six defendants appeal from judgments of conviction entered November 18, 1988,[1] in the Southern District of New York (Constance Baker Motley, Judge) after a five-month jury trial.

The appeal presents a host of issues. It also requires some consideration of the distinction between bribes and extortion payments, on the one hand, and political contributions and legal fees, on the other hand. The distinction is clear in theory, but this case demonstrates how blurred the line can become in practice when a company that requires political assistance and legal services in dealing with governmental bureaucracies makes payments to office holders and lawyers associated with them. Though the distinction is implicated in this case, we are satisfied that the risk of mischaracterizing lawful political contributions and legal fees as bribes and extortion payments did not reach the point where rights of the defendants were denied. Other considerations, however, lead us to reverse convictions of some defendants on some counts. We affirm the convictions of all defendants on at least two counts.

1. Ehrlich's judgment was entered January 10, 1989.

BACKGROUND

To promote understanding of the many issues in this complex case we set forth first the undisputed facts of Wedtech's history and then the Government and the defense contentions concerning the different activities that form the basis for the criminal charges.

Undisputed Facts. Wedtech began its existence as Welbilt Electronic Tool & Die Corporation ("Welbilt"), a small sheet metal fabricating company located in the South Bronx. Welbilt changed its name to Wedtech in 1983 when it made a public offering of its stock. For convenience, we will refer to the company at all times as "Wedtech." Defendant John Mariotta founded the company and remained chairman until company officials ousted him in 1986. In 1975 Wedtech was accepted into the Small Business Administration's "Section 8(a)" program, under which minority-owned businesses are eligible for government contracts without competitive bidding. *See* 15 U.S.C. § 637(a) (1988). Mariotta is of Puerto Rican descent.

In 1978 defendant Mario Biaggi, then a Congressman from the Bronx, met Mariotta and Fred Neuberger, a co-owner of Wedtech. In addition to serving in Congress, Biaggi was at that time a partner in a small law firm, known as Biaggi & Ehrlich. His law partner was defendant Bernard Ehrlich. Wedtech retained Biaggi & Ehr-

lich, initially at an annual retainer of $20,000. The retainer was subsequently increased in stages to $150,000. Biaggi withdrew as a member of the law firm in 1979, after the House of Representatives adopted Rule XLVII, which limited outside income of members of the House to 30 percent of their salaries.[2] The law firm bought his partnership interest for $320,000 to be paid over a ten-year period. Biaggi remained in an "of counsel" relationship to the firm. Biaggi's son, defendant Richard Biaggi, became a partner in the firm in 1983.

Starting in 1978, Biaggi (all references are to the father, unless otherwise indicated) contacted various governmental officials on behalf of Wedtech, urging awards of contracts from the Defense Department through the SBA's section 8(a) program and loans from the Economic Development Administration. In addition to Biaggi, Wedtech also benefitted from the services of attorney E. Robert Wallach, former White House assistant Lyn Nofziger, and other Washington lobbyists. Wallach frequently contacted then White House Chief of Staff Edwin Meese on Wedtech's behalf.

Among the benefits achieved for Wedtech by its lobbyists and lawyers were the awards of a $27 million contract in 1982 to

2. Rule XLVII was adopted after enactment of the Ethics in Government Act of 1978, Pub.L. 95-521, 92 Stat. 1824 (1978), *codified at* 5 U.S.C. app. § 210 (1988), which limited outside income of Executive Branch officials.

make small engines for the Army and a $24 million contract in 1984 to make pontoons (raft-like structures carried on ships to aid in unloading) for the Navy. Despite these contract awards, Wedtech experienced serious financial difficulties and ultimately filed for bankruptcy at the end of 1986.

Contentions Concerning Criminality. The Government's evidence against the defendants came primarily from four Wedtech officials, Fred Neuberger, Mario Moreno, Lawrence Shorten, and Anthony Guariglia. These four cooperating witnesses had been charged with a series of federal and state violations arising out of their activities at Wedtech and had pled guilty pursuant to plea agreements. All four testified under grants of use immunity. Their testimony concerned six basic matters:

1. *The Five Percent Stock Interest.* When Wedtech went public, the company issued two and one-half percent of its stock to Ehrlich and an equal percent to Richard Biaggi. The Government contended that Richard was given his share as a nominee for his father, that the total five percent stock interest was paid as a bribe to influence Congressman Biaggi to use the powers of his office to secure government contracts for Wedtech, and that the payment was made in response to an extortionate demand by the Congressman, aided by Ehrlich. A restriction precluded sale of the shares for two years, a circumstance that

made it difficult to ascertain their value when issued. The law firm's accountant placed the value, when issued, at $35,000 for each recipient. After the restriction was lifted, Ehrlich and Richard Biaggi sold about one-third of their shares, each realizing more than $600,000.

The defendants contended that the five percent stock interest was transferred to the partners of the law firm, Ehrlich and Richard Biaggi, in fulfillment of a previous promise to reward the firm for its loyalty to Wedtech in the early days when the firm billed modestly for legal services, declined to insist on prompt payment, and did not bill at all for some services. Defendants also contended that Richard Biaggi was issued the stock for himself as a partner in the law firm, and not as a nominee for his father.

2. *The $50,000 Loop Drive Payment.* After Wedtech obtained the pontoon contract from the Navy, it needed a waterside property at which to test the vessels and identified a site known as One Loop Drive, located in the Bronx. The property was owned by New York City. To secure the City's willingness to lease the property, Ehrlich sought the assistance of defendant Stanley Simon, who was then the Bronx Borough President and a member of the Board of Estimate, which approved City leases. Simon arranged for Wedtech officials to meet with Susan Frank, the City's Commissioner of Ports and Terminals.

Over the course of a few days in June 1984, a three-year lease was negotiated whereby the City agreed to rent the Loop Drive property to Wedtech for $50,000 a year, well below the annual rent of $125,000 the City had initially requested. Ehrlich negotiated the lease terms on behalf of Wedtech. Ehrlich and his firm also negotiated with a corporation that occupied the building at One Loop Drive to assure Wedtech's use of the site's parking lot in connection with waterside activities required to fulfill the pontoon contract.

The lease required approval of the Board of Estimate. Wedtech needed prompt approval in order to satisfy the Navy that it had the waterside site needed to perform the contract. To secure approval at the Board's June 13 meeting required unanimous consent, since the matter had arisen too quickly to be placed on the agenda for that meeting. Two Board members objected, and, consequently, the item was deferred until July. Biaggi called Simon and demanded his assistance in having the lease approved at a subsequent meeting. According to Moreno, Ehrlich reported that Biaggi had "punished" Simon, warning him "that his next election depended on Mario Biaggi's support and that he had to start moving really quick." The Board approved the lease at its July 12 meeting.

Ehrlich informed Moreno that the law firm would bill Wedtech $50,000 for work

performed in connection with the Loop Drive property. At that time the firm's annual retainer was $150,000. Ehrlich said that the transaction required considerable extra work. He referred both to strictly lawyering activities and to political efforts the firm undertook to secure Board of Estimate approval. The firm billed Wedtech $50,000 for "Ports and terminal matter. Services rendered June 1984," and the bill was paid on July 12. Thereafter, Moreno paid a young associate at the firm, Carlos Cuevas, Jr., $5,000 as a bonus for his work on the Loop Drive transaction.

The Government contended that the $50,000 payment to the law firm was a bribe to Biaggi to induce him to use his official position to secure City and Board of Estimate approvals for the Loop Drive lease and that the payment was made in response to extortionate demands by Biaggi, aided and abetted by Ehrlich.

The defendants contended that the $50,000 was a fee for legal services rendered in connection with leasing the Loop Drive property.

3. *Benefits to Simon.* The Government contended that Stanley Simon also made an extortionate demand upon Wedtech for $50,000, which the Government alleged was in connection with the Loop Drive lease. Neuberger testified that in June 1984 he attended a benefit for the Riverdale (New York) Hebrew Home for

the Aged held at the Yonkers racetrack. At that function, according to Neuberger, Simon said to him that "he [Simon] is running a re-election campaign that is a very hard fought campaign and he needs help." When Neuberger asked, "[W]hat kind of help do you expect?", Simon replied $75,000 or $100,000. Neuberger thought these figures were ridiculous and observed that it was illegal for a corporation "to make a contribution to a campaign." Simon then said, "[W]ell, do it in the form of donations to synagogues, churches and some other expenses." Neuberger said the best he could do was $50,000 and "we settled for that."

Neuberger also testified that at the same function, he asked Susan Frank how things looked for the Loop Drive lease and was told that "you are in good shape." At that point, Neuberger testified, Simon pulled him aside and cautioned him not to talk with Frank.

Neuberger testified that the following Monday he gave instructions to a Wedtech employee, Ceil Lewis, to release a total of $50,000 for purposes that Simon would later indicate to her and to disburse the funds from a Wedtech account known as the FHJ account. The Government contended that the FHJ account was used to pay most of the $50,000 that Neuberger had promised Simon. According to the Government, the major expenditures were

$20,000 in charitable contributions to two synagogues, $10,000 as a political contribution to "Friends of Simon," and $10,000 in cash. Lewis testified that she gave the cash in a sealed envelope to Simon's assistant, Ralph Lawrence; he testified that he received an envelope from Lewis and gave it to Simon, unopened.

Simon acknowledged that Wedtech benefitted his reelection campaign but disputed the timing, purpose, and completion of the $50,000 of payments. He presented evidence from those handling arrangements for the Riverdale Hebrew Home to show (a) that the *June* 1984 fund-raising event at the Yonkers Raceway was arranged by the Men's Club of the Home and that the guest list, which included about 80 people, did not include the names of Stanley Simon or Fred Neuberger, and (b) that the Bronx Division of the Hebrew Home ran a fund-raising event at the Yonkers Raceway in *November* 1984 and that the guest list for this event showed Stanley Simon, Fred Neuberger, and Susan Frank in attendance.

Simon contended that the discussion concerning a political contribution occurred in January 1985 at his home on an occasion when he was receiving visitors mourning the death of his father. At that time, he testified, Neuberger volunteered that "people at the company" were going to contribute $50,000 to his 1985 reelection campaign for borough president. Simon testified

that Neuberger later contributed $10,000 and Mariotta $5,000. He denied receiving other political contributions from Wedtech officials and denied receiving a cash payment delivered by Lawrence or anyone else.

Thus, Simon's version was that the June 1984 race-track meeting between him and Neuberger never occurred, that such a meeting did occur at a similar fund-raising event in November 1984, months after the Board of Estimate had approved the Loop Drive lease, that the political contribution was not discussed until January 1985, that only $15,000 of contributions were received, and that any payments received were legitimate political contributions.

In addition to the $50,000 of payments allegedly made in response to an extortionate demand in connection with the Loop Drive lease, the Government contended that Simon received three other unlawful benefits, one of which was paid by Wedtech. Moreno testified that in 1981 Ehrlich introduced him to Simon, whom Ehrlich described as an important person to be "cultivated." Later Ehrlich told Moreno that Simon wanted Wedtech to hire Simon's brother-in-law, Henry Bittman. Wedtech complied, hiring Bittman as a payroll clerk at $20,000 a year and subsequently raising his salary to $35,000. Wedtech employees testified that Bittman's work was unsatisfactory but that he was kept on the payroll in fulfillment of a promise to Simon.

Simon did not dispute that Wedtech hired Bittman and gave him raises but denied that he had ever asked anyone at Wedtech to do so.

The two other alleged benefits were not paid by Wedtech. First, the Government contended that Simon hired Ralph Lawrence as his assistant when he was the Bronx Borough President and, when Lawrence's salary rose to $36,000, demanded that Lawrence kick back to him one half of all subsequent salary increases. Lawrence testified that, as his salary rose to $52,000, he shared half of his salary increases with Simon, providing the kickbacks in cash and purchases of goods and services for Simon's benefit, a significant portion of which was meals. The value of the kickbacks was approximately $14,000 over three and one-half years.

Simon acknowledged hiring Lawrence but denied demanding or receiving any portion of his salary. He also denied receiving cash from Lawrence. He acknowledged occasions when Lawrence paid a meal check for him, but maintained that the two ate together hundreds of times a year (as Lawrence had testified) and that sometimes Simon paid and sometimes Lawrence paid. Simon accused Lawrence of lying about the extortion arrangement, contending that Lawrence had made up the claim during a late-night questioning by the Bronx District Attorney's office. Lawrence conceded

that he was frightened during the questioning and made his accusations around 2 a.m.

The second non-Wedtech illegality charged to Simon concerned Sabino Fogliano, a Bronx contractor. The Government contended that Simon arranged introductions for Fogliano with various New York City officials and that in return Fogliano provided benefits to Simon. The only benefit alleged in the charges against Simon was $9,000 worth of marble and tile work done by Fogliano at Simon's home. Fogliano testified that he did the work at Simon's request and did not send a bill because he knew he would not be paid.

Simon acknowledged that Fogliano had supplied labor and materials worth $9,000 for work at his home, but he testified that the tile work was part of an overall home renovation job estimated to cost more than $22,000, that the job was never finished, and that he did not pay Fogliano both because he was not billed and because the work was not completed. Simon also contended that Fogliano did not send a bill once he learned that Simon was under federal investigation because Fogliano wanted to avoid any dealings that might direct federal investigators in his direction. Fogliano testified against Simon under a grant of use immunity from the federal government, and admitted on cross-examination that he had evaded federal income taxes on $800,000 of income. After trial, however,

Fogliano pled guilty to New York state charges of evading taxes on $8,500,000. Simon unsuccessfully sought a new trial on the ground that Fogliano had lied to minimize the extent of his tax evasions, thereby precluding an effective attack on his credibility and his motive for accusing Simon.

4. *The Section 8(a) Fraud.* The Government contended that Wedtech's application for admission to the section 8(a) program and its subsequent retention in the program by the SBA were fraudulent. A company qualifies for the section 8(a) program if it is at least 51 percent owned by "one or more socially and economically disadvantaged individuals," 15 U.S.C. § 637(a)(4)(A)(i)(I), a phrase that includes members of groups subjected to racial or ethnic prejudice, *id.* § 637(a)(5); *see* 13 C.F.R. § 124.105(b) (1990) (Hispanic Americans). Mariotta is of Puerto Rican descent. When Neuberger became Mariotta's partner, they created false documents to make it appear that Mariotta owned 66⅔ percent of Wedtech's stock, whereas each in fact owned 50 percent.

After Wedtech went public, the dilution of Mariotta's interest prompted Mariotta and other Wedtech officials to devise fraudulent arrangements to make it appear that Mariotta retained an ownership interest above 50 percent. The device was a series of "stock purchase agreements" whereby insiders who had received stock purported

to assign their interests to Mariotta, who was obligated to pay for the shares over a ten-year period, with no payments due for the first two years; upon Mariotta's failure to pay, the shares would revert to the insiders. Mariotta verbally agreed with the insiders that he would not make the payments, thereby assuring that the insiders would retain their interests.

The defendants contended that Mariotta owned two-thirds of Wedtech's stock when the first section 8(a) application was made and that the stock purchase agreements whereby he retained record ownership of a majority of Wedtech shares, after the public offering, were bona fide.

5. *The Slush Fund.* The Government contended that Mariotta and Neuberger established a bank account, known as "FHJ Associates," which they used to divert to themselves cash that belonged to Wedtech. The account was funded with money earned on goods manufactured by Wedtech but billed on FHJ invoices. Subsequently, other Wedtech officials, including Moreno, Shorten, and Guariglia, participated in the FHJ account. By the time he left Wedtech, Mariotta had received more than $1 million in cash from the FHJ account. The Government made no claim that any defendant other than Mariotta benefitted from the FHJ account.

Mariotta contended that funds he received from the FHJ account were repay-

ments of loans that he had made to Neuberger.

6. *The Neglia Bribe.* The Government contended that Wedtech officials obtained the cooperation of defendant Peter Neglia, the New York regional administrator of the SBA and later the chief of staff to the SBA Administrator in Washington, by bribing him with a promise of future employment. According to Moreno's testimony, Ehrlich and Moreno promised Neglia that after he left government employment he would have a job at the law firm of Biaggi & Ehrlich at a salary of $100,000 and that half of his salary would be paid by Wedtech.[3] The Government contended that this promise was made for Neglia's past help and in the expectation of his future assistance. Neglia had assisted Wedtech in remaining in the section 8(a) program after the public offering had diminished Mariotta's holding below the 50 percent mark, rendering Wedtech ineligible for continued participation. The Government contended that Neglia was aware of the sham nature of the Mariotta stock purchase agreements and of Wedtech's ineligibility

3. The Government also alleged, in separate counts and corresponding RICO predicate acts, that Neglia was bribed with $4,500 in contributions to Republican political organizations on behalf of Neglia and his designee, and a promise of an option to purchase 20,000 shares of Wedtech stock. The jury found these acts not proven.

for continued participation in the section 8(a) program. After the promise of future employment, Neglia alerted Wedtech to efforts brewing in the SBA and in Congress to decertify Wedtech and acted to keep Wedtech in the section 8(a) program.

Neglia denied acting improperly on Wedtech's behalf and denied being promised any employment with Biaggi & Ehrlich. He acknowledged that after he left the SBA in early 1986, he opened his own law office and did legal work for Biaggi & Ehrlich in an "of counsel" capacity to the firm. In 1986 the firm paid him $42,000.

These six episodes resulted in convictions of the appellants on the following charges:

1. The Five Percent Stock Interest:
extortion, 18 U.S.C. § 1951 (1988): Biaggi, Ehrlich
bribery, 18 U.S.C. § 201(b) (1988): Biaggi, Ehrlich, Mariotta, Richard Biaggi
gratuity, 18 U.S.C. § 201(c) (1988): Biaggi, Ehrlich, Mariotta, Richard Biaggi
mail fraud, 18 U.S.C. § 1341 (1988): Biaggi, Ehrlich, Richard Biaggi
false financial disclosure, 18 U.S.C. § 1001 (1988): Biaggi
false tax return, 26 U.S.C. § 7206(1) (1988): Biaggi, Richard Biaggi
2. The $50,000 Loop Drive Payment:
extortion: Biaggi, Ehrlich
bribery: Biaggi, Ehrlich, Mariotta
mail fraud: Biaggi, Ehrlich

3. Benefits to Simon:
$50,000 payment:
extortion: Simon
grand jury perjury, 18 U.S.C. § 1623 (1988): Simon
tax evasion, 26 U.S.C. § 7201 (1988): Simon
Job for Bittman:
extortion: Simon
grand jury perjury: Simon
Lawrence kickbacks:
extortion: Simon
tax evasion: Simon
grand jury perjury: Simon
Fogliano tile work:
tax evasion: Simon
grand jury perjury: Simon
4. The Section 8(a) Fraud:
mail fraud: Biaggi, Ehrlich, Mariotta
5. The Slush Fund:
tax evasion: Mariotta
6. The Neglia Bribe:
bribery: Ehrlich, Neglia
gratuity: Ehrlich, Neglia
obstructing justice, 18 U.S.C. § 1503 (1988): Neglia

Most of these substantive offenses were also charged as racketeering acts for purposes of RICO substantive and conspiracy offenses, 18 U.S.C. § 1962(c), (d) (1988). The jury found that Biaggi, Ehrlich, and Mariotta committed two or more RICO predicate acts and convicted these three

defendants of RICO substantive and conspiracy offenses. In addition, Biaggi was convicted of grand jury perjury for falsely denying that he contacted the Government on behalf of Wedtech.

The following aggregate sentences were imposed:

	Prison Term	Fine
Biaggi	eight years	$242,000
Ehrlich	six years	$222,000
Simon	five years	$ 70,000
Mariotta	eight years	$291,000
Richard Biaggi	two years	$ 71,000
Neglia	three years	$ 30,000

In addition, judgments of forfeiture were entered for the following amounts: Biaggi, $350,000; Ehrlich, $350,000; Simon, $25,000; Mariotta, $11,700,000.

DISCUSSION

I. Joinder

Misjoinder claims are advanced by several defendants. The major challenge is brought by Simon, who contends that he was entitled to a severance of two counts that charged criminal activity unrelated to Wedtech. Count 21 charged Simon with extorting from Ralph Lawrence, his assistant in the Bronx Borough President's office, one half of Lawrence's salary increases; Count 23 charged tax evasion for the year 1985, based on failure to report the $50,000 in benefits from Wedtech, the salary kickbacks from Lawrence, and the $9,000 of tilework from Sabino Fogliano.

Simon contends that since he was tried with other co-defendants, the governing standards are those of Rule 8(b) (joinder of defendants) of the Federal Rules of Criminal Procedure, rather than Rule 8(a) (joinder of offenses), and that joinder of Counts 21 and 23 is not permissible under Rule 8(b).

Judge Motley initially denied Simon's motion for severance, ruling that Rule 8(a) governed and that these counts were of "the same or similar character," Fed.R. Crim.P. 8(a), as other extortion counts in the indictment. *United States v. Biaggi*, 672 F.Supp. 112, 124 (S.D.N.Y.1987). Simon renewed his motion after this Court's decision in *United States v. Turoff*, 853 F.2d 1037, 1043 (2d Cir.1988), which appeared to state that claims for severance of counts in a multi-defendant case are to be governed by the standards of Rule 8(b). In a thoughtful opinion, drawing upon the equally thoughtful opinion of Judge Sand in *United States v. Clemente*, 494 F.Supp. 1310 (S.D.N.Y.1980), *aff'd on other grounds sub nom. Fiumara v. United States*, 727 F.2d 209 (2d Cir.), *cert. denied*, 466 U.S. 951, 104 S.Ct. 2154, 80 L.Ed.2d 540 (1984), Judge Motley ruled that *Turoff* should be understood to apply Rule 8(b) standards to the claim of a defendant in a multi-defendant trial only when he seeks severance of counts in which he and at least one of his co-defendants are charged,

and that Rule 8(a) standards apply to a defendant in a multi-defendant trial who seeks severance of counts in which he is the only defendant charged. *United States v. Biaggi*, 705 F.Supp. 852 (S.D.N.Y. 1988). However, Judge Motley also ruled that Counts 21 and 23 were properly joined even under the standards of Rule 8(b). *Id.* at 855–56, 862–64.

[1] Without resolving the issue of whether *Turoff* should be limited in the manner suggested by Judges Motley and Sand, we agree with the District Court that joinder of Counts 21 and 23 was proper even under Rule 8(b). Though the Lawrence extortion (Count 21) did not involve the same victim as Simon's extortion of Wedtech, the Lawrence extortion was within "the same series of acts or transactions," Fed.R.Crim.P. 8(b), as the extortions charged to Simon's co-defendants. Simon used Lawrence as the means of obtaining many of the benefits he derived from Wedtech, notably the $10,000 cash payment. His demand to receive benefits from Lawrence was inextricably related to his extortion of Wedtech. Proof of one scheme was helpful to a full understanding of the other. *See United States v. Turoff*, 853 F.2d at 1044.

[2] Simon's tax evasion for 1985 (Count 23) was also properly joined under Rule 8(b). *Turoff* recognized the propriety of joining tax counts to non-tax counts in mul-

ti-defendant cases where the revenue on which the tax was evaded resulted from the criminal conduct charged in the non-tax counts. *See United States v. Roselli*, 432 F.2d 879 (9th Cir.1970), *cert. denied*, 401 U.S. 924, 91 S.Ct. 883, 27 L.Ed.2d 828 (1971). The core of the tax count was the income extorted from Wedtech and Lawrence. Since a tax count deals with taxes evaded on a single year's income, it was not error in this case to join the tax count, even though it included a relatively small amount of income from the unrelated transaction involving Fogliano. *See United States v. McGrath*, 558 F.2d 1102, 1106 & n. 6 (2d Cir.1977). That principle, however, has its limits. We would have a very different case if the Government had sought to join several defendants who all extorted benefits from Fogliano and then joined a tax count that charged Simon with evading taxes not only on income from Fogliano but also on income extorted from Wedtech. But where, as here, the Wedtech extortion is central to the trial and income from it forms the core of the tax count, that count need not be severed just because it includes a small amount of unreported income from other sources.

[3] We also reject Richard Biaggi's claim that he was unfairly prejudiced by his joinder with defendants charged with the core of the Wedtech illegalities. He contends that he was placed in an untenable position of having to prove his mem-

bership in the firm of Biaggi & Ehrlich to justify his receipt of half of the five percent stock interest in Wedtech, thereby subjecting himself to the prejudicial effect of the evidence concerning the firm's activities with which he was not personally involved. However, it is obvious that even in a separate trial much of the evidence concerning the activities of the firm and of Wedtech would have been admissible in evidence to prove the circumstances concerning the five percent stock transaction.

II. Jury Selection

Appellants make two challenges to the selection of the jury. Mariotta contends that the jury selection process used in the Southern District of New York unlawfully discriminates against Blacks and Hispanics, and he and Biaggi contend that the Government's use of its peremptory challenges discriminated against Hispanics and Italian-Americans.

A. *The Southern District's Jury Plan.* The Southern District's Jury Plan uses voter registration lists as the exclusive source of names of prospective jurors. After a two-day hearing, Judge Motley found the following facts pertinent to Mariotta's claim that use of voter registration lists resulted in unlawful underrepresentation of Blacks and Hispanics. Based on 1984 figures, the percentage of Blacks in the population of the Southern District was 19.9, and the percentage of Blacks in the

Master Jury Wheel for the Manhattan seat of court was 16.3. The comparable percentages for Hispanics were 15.7 and 11.0. The disparity for Blacks, *i.e.*, the underrepresentation, was 3.6 percentage points and for Hispanics, 4.7 percentage points. *See United States v. Biaggi*, 680 F.Supp. 641, 647, 652 (S.D.N.Y.1988).

[4] 1. *Equal Protection Claim.* Focusing first on the Fifth Amendment claim, based on the equal protection component of that amendment's Due Process Clause, Judge Motley applied this Court's analysis in *Alston v. Manson*, 791 F.2d 255, 257 (2d Cir.1986), *cert. denied*, 479 U.S. 1084, 107 S.Ct. 1285, 94 L.Ed.2d 143 (1987). *Alston* read *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), to establish a three-part test for a *prima facie* case of jury discrimination amounting to a denial of equal protection: (a) a cognizable group (b) that is substantially underrepresented and (c) a selection procedure that is not racially neutral.[4] Agreeing with

4. Judge Motley questioned whether *Castaneda* established a three-part test for a *prima facie* case or required only substantial underrepresentation of a cognizable group, pointing out that the Supreme Court in *Castaneda* said that "'a selection procedure that is susceptible of abuse or is not racially neutral *supports* the presumption of discrimination raised by the statistical showing.'" *United States v. Biaggi*, 680 F.Supp. at 651 (quoting *Castaneda v. Partida*, 430 U.S. at 494, 97 S.Ct. at 1280 (emphasis added by Judge Motley)). Nevertheless, the District Judge felt bound by *Alston*. We share her doubts, but feel equally bound by *Alston*.

Mariotta that the first two elements of the test were met, findings the Government does not contest on appeal, the District Judge rejected the equal protection challenge on the ground that use of the voter registration list as the sole source of prospective jurors had not been shown to deprive the Jury Plan of racial neutrality or render it susceptible to abuse.

As Judge Motley pointed out, Mariotta made no claim that Blacks or Hispanics have been hindered in registering to vote. They have simply chosen not to register in the same proportion as Whites. That circumstance is quite different from the Texas "key man" selection system at issue in *Castaneda* or the Connecticut quota system favoring small towns with low minority populations at issue in *Alston*. Mariotta disputes that the unimpaired ability of Blacks and Hispanics to register is sufficient reason for tolerating underrepresentation resulting from use of voter lists. He relies on *Alston* and contends that in that case the minority populations in Connecticut's larger communities could have rectified their underrepresentation on the jury lists by moving in greater numbers to small towns. But the issue does not turn on the physical capacity of minorities to increase their proportion on lists used as sources for prospective jurors. Giving up one's community of residence is a major dislocation. Registering to vote is a simple task of minimal inconvenience, viewed by

many as an obligation of citizenship. The Fifth Amendment challenge was properly rejected.

[5] 2. *Sixth Amendment Claim.* Mariotta also challenged the Jury Plan as a violation of his rights under the Sixth Amendment and the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861–1869 (1988). In *Alston* we recognized that a jury selection system yielding a significant underrepresentation of a minority group in jury venires can violate the "fair cross-section" requirement of the Sixth Amendment, even if proof of discriminatory intent necessary for a Fifth Amendment violation is absent. 791 F.2d at 258; *see Duren v. Missouri*, 439 U.S. 357, 368 n. 26, 99 S.Ct. 664, 670 n. 26, 58 L.Ed.2d 579 (1979). Judge Motley correctly observed that we arguably blurred that distinction in *United States v. Young*, 822 F.2d 1234, 1239–40 (2d Cir.1987), in rejecting a Sixth Amendment challenge to a venire drawn from voter lists. *See United States v.* three Hispanics to a venire of typical size would be required to eliminate underrepresentation, and she concluded that these figures, though larger than those in *Jenkins*, "are not so great as to amount to a violation of the fair cross-section requirement." *United States v. Biaggi*, 680 F.Supp. at 655. We think the facts of this case press the *Jenkins* "absolute numbers" approach to its limit, and would find the Sixth

Amendment issue extremely close if the underrepresentations had resulted from any circumstance less benign than use of voter registration lists. Nevertheless, we agree with the conclusion reached by the District Court and reject the Sixth Amendment challenge. We also agree that rejection of the Sixth Amendment claim, in the circumstances of this case, necessarily requires rejection of the statutory claim. *Id.* at 657.

B. *The Government's Peremptory Challenges.* Mariotta contends that the Government used its peremptory challenges to exclude Hispanics, and Biaggi makes the same contention with respect to Italian-Americans. Defendants initially raised their claims immediately after the peremptory challenges were exercised. Judge Motley ordered the defendants to present their claims in written motions, a requirement the defendants acknowledged without objection. However, written motions were not submitted until after the conclusion of the trial. Judge Motley then held a two-day hearing at which one of the prosecutors was questioned extensively about the Government's reasons for challenging members of the venire with Hispanic or Italian surnames.

[9] The District Judge ruled that the defendants had shown a sufficient pattern of Government use of peremptory challenges against Hispanics and Italian-Amer-

icans to constitute a *prima facie* case of discrimination, obliging the Government to demonstrate neutral explanations for its challenges. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *United States v. Alvarado*, 891 F.2d 439 (2d Cir.1989), *vacated on other grounds*, 58 U.S.L.W. 3815 (U.S. June 25, *Biaggi*, 680 F.Supp. at 653–54. Yet, as she also pointed out, *Young* and *Alston* are reconcilable, *id.* at 654, and we agree with Judge Motley that discriminatory intent is not an element of a Sixth Amendment "fair cross-section" claim.

[6] The District Judge rejected Mariotta's Sixth Amendment claim on the ground that the degree of underrepresentation was not great enough to violate the "fair cross-section" requirement. In reaching that conclusion, she applied the so-called "absolute numbers" approach, used by this Court in *United States v. Jenkins*, 496 F.2d 57 (2d Cir.1974), *cert. denied*, 420 U.S. 925, 95 S.Ct. 1119, 43 L.Ed.2d 394 (1975). In *Jenkins*, we deemed an underrepresentation too small to violate Sixth Amendment standards where proper representation would have required the addition of only one member of the minority group to a typical venire of 60 persons. Though the "absolute numbers" approach has been called into question, *see Alston v. Manson*, 791 F.2d at 259, we have recently reaffirmed its use. *United States v. Rosar-*

io, 820 F.2d 584, 585 & n. 1 (2d Cir.1987); *see Anderson v. Casscles*, 531 F.2d 682, 685 & n. 1 (2d Cir.1976). The risk of using this approach is that it may too readily tolerate a selection system in which the seemingly innocuous absence of small numbers of a minority from an average array creates an unacceptable probability that the minority members of the jury ultimately selected will be markedly deficient in number and sometimes totally missing. Of course, the Sixth Amendment assures only the *opportunity* for a representative jury, rather than a representative jury itself, *see Roman v. Abrams*, 822 F.2d 214, 229 (2d Cir.1987), *cert. denied*, — U.S. —, 109 S.Ct. 1311, 103 L.Ed.2d 580 (1989); *McCray v. Abrams*, 750 F.2d 1113, 1124–25 (2d Cir. 1984), *vacated and remanded*, 478 U.S. 1001, 106 S.Ct. 3289, 92 L.Ed.2d 705 (1986), but that opportunity can be imperiled if venires regularly lack even small numbers of minorities necessary to reflect their proportion of the population.

[7, 8] In this case, Judge Motley found that addition of two Blacks and two to 1990). The Government had challenged four of the six Hispanics and five of the six Italian–Americans chosen for the regular jury, and two of the four Hispanics chosen for service as alternates. Judge Motley then found that the prosecution's explanations for its challenges were neutral and not pretextual, and satisfactorily rebutted the claim of discrimination. These findings

have considerable support in the record and are not clearly erroneous. *See United States v. Biaggi*, 853 F.2d 89, 96 (2d Cir. 1988), *cert. denied*, — U.S. —, 109 S.Ct. 1312, 103 L.Ed.2d 581 (1989). . . .

[10–12] Two aspects of the *Batson* claim merit brief additional comment. First, *Batson* objections should be entertained and adjudicated during the process of jury selection. Though the District Court's preference for written motions in a complex trial is understandable, that preference must give way to the need to resolve a *Batson* claim at the point where prompt corrective action can be taken if the claim is successful. "We recognized in *McCray* [*v. Abrams*, 750 F.2d 1113 (2d Cir.1984),] and *Roman* [*v. Abrams*, 822 F.2d 214 (2d Cir.1987),] that the prosecutor's unwarranted exclusion of cognizable groups should be remedied on the spot, without waiting to see the ultimate composition of the jury." *United States v. Alvarado*, 891 F.2d at 445. Postponing consideration of a *Batson* claim until the trial is in progress, or even completed, as in this case, risks infecting what would have been the prosecutor's spontaneous explanations with contrived rationalizations, and may create a subtle pressure for even the most conscientious district judge to accept explanations of borderline plausibility to avoid the only relief then available, a new trial. *Cf. United States v. Tunnessen*, 763 F.2d 74, 78 (2d Cir.1985) (requiring contempora-

neous statement of "ends of justice" continuance under 18 U.S.C. § 3161(h)(8)(A) (1988) to guard against risk that district judge "may simply rationalize his action long after the fact"). The postponement of the *Batson* inquiry is no ground for complaint in this case, however, because the defendants did not object to the requirement of a written motion and did not present the motion until the end of the trial.

[13, 14] Second, though we accept the District Court's findings as to the prosecution's neutral explanations, we reject the Government's effort to bolster its denial of discrimination by showing how closely the ethnic composition of the jury resembled that of the venire from which it was selected. The composition of the jury may be relevant to rebutting a claim of discrimination in the trial court, *see United States v. Biaggi*, 673 F.Supp. 96, 107 (E.D.N.Y.1987), *aff'd*, 853 F.2d 89 (2d Cir.1988), *cert. denied*, — U.S. —, 109 S.Ct. 1312, 103 L.Ed.2d 581 (1989), but the pertinent comparison is between the jury as selected and the racial or ethnic composition of the population of the judicial district, not the composition of the venire drawn for the particular case, *id.* The latter might contain an underrepresentation of a cognizable group compared to the pertinent population. *Cf. United States v. Jenkins*, 496 F.2d at 65. In this case, however, Hispanics were in fact 17.2 percent of the venire, compared to

15.7 percent of the Southern District population.

III. Challenges to the Sufficiency of the Evidence

A. *The Five Percent Stock Interest.* Richard Biaggi was convicted only of offenses related to the five percent stock interest. He was convicted (a) of aiding and abetting his father's commission of bribery and gratuity offenses based on the stock interest, (b) of mail fraud based on fraudulent concealment of his father's ownership of half of the five percent stock interest (112,500 shares), and (c) of filing false income tax returns by overstating his income to include on his 1983 return receipt of the 112,500 shares and on his 1985 return receipt of gain from the sale of one-third of these shares. He contends that the evidence is insufficient to show that he aided and abetted the bribery and gratuity offenses of his father that were based on the stock interest. For purposes of this appeal, he concedes that the evidence sufficed to show that the Congressman committed bribery and gratuity offenses with respect to the stock. His primary point is that there is insufficient evidence to show that he knew the stock was issued to influence his father in his official duties (bribery) or because of his father's performance of official acts (gratuity). He also contends that the evidence is insufficient to

show that he was holding the 112,500 shares as nominee for his father.

[15] Taking these claims in reverse order, we are satisfied that there was sufficient evidence that Richard was holding his father's 112,500 shares as a nominee. The demands by Biaggi and by Ehrlich for Wedtech stock began in 1981. Moreno testified that when Ehrlich became aware of Moreno's nine percent stock interest, he pressed Moreno to honor what he alleged was a prior promise by Mariotta to issue some stock to Biaggi & Ehrlich. In a conversation in 1982, Biaggi made a demand for a five percent override on all contracts that he "could help bring into the company." Wedtech officials rejected that demand, but suggested that they could pay the firm five percent of the subcontracts resulting from such contracts. At this meeting they agreed to issue five percent of Wedtech stock to the firm. There is no evidence that Richard Biaggi was present at or informed of any of the discussions at which the five percent stock interest was demanded or agreed to.

In 1983, in anticipation of the public offering of Wedtech's stock, Biaggi and Ehrlich pressed Wedtech to issue their promised stock interest. An early draft of the agreement for the share transfer provided that 225,000 shares (five percent) would be granted to the law firm of Biaggi & Ehrlich. Later in 1983, Biaggi, Ehrlich, and

Richard met with Irwin Wolf, Biaggi's tax accountant, to discuss how the 225,000 shares would be handled. Wolf testified that the law firm was to receive "fees in kind, namely, the stock of the corporation." Wolf was asked whether the Congressman could retain ownership if the shares were issued in the name of the law firm. Wolf said that was not possible because the Congressman had sold his interest in the firm in 1979. Wolf was then asked about the consequences of placing the Congressman's shares in his own name. Wolf said that, if that occurred, the issuance of the shares would be income to the Congressman in 1983 and that the receipt of such income might put him over the statutory cap on outside earnings. By House Rule XLVII, effective after December 31, 1978, that cap was 30 percent. After these alternatives were rejected, the conclusion was reached "that the stock would have to be registered in the name of Richard, because there didn't seem to be any other alternative." Thereafter, Ehrlich and Richard were each issued 112,500 shares.

Evidence of events after the shares were received supports a finding that Richard was holding his father's stock. In late 1983, when it was proposed that Richard transfer some of the shares to Mariotta to support his claim of Wedtech's entitlement to section 8(a) eligibility, the Congressman decided that the shares would be transferred, despite Richard's objection, and the

Congressman dictated special terms, not applicable to other transferors, for the "default" provisions of the transfer to Mariotta. When Richard sold one-third of the shares in 1985, he retained nearly all the proceeds, after using enough for taxes, in a money market account paying approximately seven percent interest, even though he was then paying fourteen percent interest on two mortgage loans. Finally, the evidence undermined any claim that Richard could possibly have been entitled to the 112,500 shares as a member of the firm. When the stock was issued, he had been a lawyer for only nine months, he did little work on the Wedtech account, and he was not listed as a partner in the firm until 1985.

[16] Though the evidence amply supports a finding that Richard held the stock as nominee for his father, it fails to support a finding, crucial to Richard's bribery conviction, that he knew the shares were issued for his father's benefit in return for his father's being influenced to assist Wedtech as a Congressman. There was no evidence that Richard heard any of the statements that supported the finding that the stock was a bribe and an extortion, such as the Congressman's demand for five percent of contracts he brought to Wedtech, a demand that accompanied the negotiation of the five percent stock interest, and the threatening remark that the Congressman could destroy the company.

The Government contends that Richard must have known that the shares were issued to his father for an unlawful purpose because, according to the Government, their value of $1,800,000 exceeded the value of any legal services rendered by the law firm. This speculation is unsupportable. Though the public offering price was $16 per share, the shares issued to Ehrlich and Richard contained a restriction precluding sale within two years. There is dispute as to the value of the restricted shares when issued, but there is no evidence that in 1983 anyone was willing to pay anything near $1,800,000 for 112,500 shares that could not be sold until 1985. The accountants who prepared the 1983 tax returns for Ehrlich and Biaggi valued the 112,500 shares at $34,000, apparently using a book value supplied by Wedtech. Even if the value in fact was somewhat higher, there is no evidence that the value was so high, in relation to the value of past services rendered by the firm, as to lead Richard to believe that the shares must have been issued for an unlawful purpose.

There is sufficient evidence, unchallenged by Biaggi or Ehrlich, that *they* knew why the shares were issued. And it is possible that the Congressman told his son the true reason. But knowledge, though inferable from circumstances, must be based on evidence, not speculation. What little evidence exists as to Richard's knowledge would have supported a finding

that he knew that his father's stock was put in his name to circumvent the limits on a Congressman's outside income. Had Richard been charged with aiding and abetting a violation of that restriction, a conviction could stand. But the evidence did not permit a rational jury to find beyond a reasonable doubt that Richard knew that his father received the shares as a bribe or a gratuity, and without evidence of such knowledge, Richard's conviction for aiding and abetting the bribery and the gratuity may not stand. *See United States v. Zambrano*, 776 F.2d 1091, 1097 (2d Cir.1985) (aider and abetter must have the mental state necessary to convict the principal); *United States v. Perry*, 643 F.2d 38, 46 (2d Cir.) (same), *cert. denied*, 454 U.S. 835, 102 S.Ct. 138, 70 L.Ed.2d 115 (1981).

[17–20] The reversal of these counts, however, does not affect Richard's conviction on the two counts charging the filing of false income tax returns. Since the evidence sufficed to show Richard's knowledge that the shares were owned by his father, he was properly convicted of overstating his income to include receipt of the shares and the subsequent profit from their sale. The false tax return counts require knowledge only of the true ownership of the shares, not of the unlawful purpose for which they were issued. As to the mail fraud count, the Government advises only that since Richard's attack on his mail fraud conviction "rests" on his chal-

lenge to the bribery and gratuity convictions, it will not "address the mail fraud count separately." Brief for Appellee at 63 n. *. This appears to concede that Richard's mail fraud conviction cannot survive reversal of his bribery conviction, and the mail fraud conviction will therefore be reversed. Reversal of Richard's bribery, gratuity, and mail fraud convictions results in vacation of the $51,000 in fines imposed on those counts but does not reduce his sentence since he received concurrent two-year sentences. Nevertheless, since the District Judge may well have regarded the tax return offenses as aggravated because of their relation to the bribery offense, we think there should be an opportunity for resentencing on the tax return counts, now that the bribery conviction has been reversed. *See United States v. Sperling*, 506 F.2d 1323, 1343 (2d Cir.1974), *cert. denied*, 420 U.S. 962, 95 S.Ct. 1351, 43 L.Ed.2d 439 (1975); *United States v. Rizzo*, 491 F.2d 1235, 1236 (2d Cir.1974).

The Government contends that this opportunity for reconsideration of the sentence should not be afforded, pointing out that we have previously denied the Government's request to permit reconsideration of a sentence claimed to be lenient where conviction on a count carrying a more severe sentence is reversed. *See United States v. Pisani*, 787 F.2d 71 (2d Cir.1986). We are not persuaded that claims for reconsideration of sentences must be treated symmet-

rically. A sentencing judge has the option of imposing a sentence of adequate severity on a less serious count no matter what happens to the sentence on a more serious count. An opportunity to consider increasing a sentence on a minor count after a sentence on a major count is vacated is not required. *See id.* at 75–76. But the initial sentence on a comparatively minor count may well have been influenced upwards in part by a defendant's conviction on serious charges, and the reversal of a conviction on such charges should afford an opportunity for consideration of a reduction of the sentences on the remaining counts, unless the sentencing judge's intent to scale sentences according to the seriousness of the several offenses is clear.

[21] B. *The $50,000 Loop Drive Payment.* Ehrlich contends, in an argument that applies as well to Biaggi and Mariotta, that the evidence is insufficient to show that the $50,000 Loop Drive payment was unlawful. It is undisputed that Biaggi & Ehrlich billed Wedtech $50,000 for legal services rendered in connection with the leasing of the Loop Drive property from New York City. That payment formed the basis of Biaggi's convictions for extortion, accepting a bribe, and mail fraud, Ehrlich's convictions for aiding and abetting these offenses, and Mariotta's conviction for bribing Biaggi. The mail fraud convictions rested on the alleged falsity of the law firm's bill in stating that it was rendered

for legal services. The issue as to the criminality of the payment is whether the demand for the payment was extortion by Biaggi and whether the payment was a bribe of Biaggi, as the Government contends, or whether the payment was sought and made lawfully as a fee for legal services, as appellants contend. The issue presents difficulties because this case is not the garden variety of extortion/bribery in which a payment is made to a public official who has no colorably lawful claim to it. Where a federal law enforcement officer is paid cash, for example, it will usually be clear that the payment is unlawful; the payment will at least be a gratuity if paid because of his official act, 18 U.S.C. § 201(c)(1)(B), it will be a bribe if paid in exchange for his being influenced in his duties, *id.* § 201(b)(2)(A), and it will be extortion if he demanded it under color of official right, *id.* § 1951(b)(2). However, a payment to a law firm is normally a legitimate payment for services rendered, and the payment does not necessarily become unlawful because the firm used its political contacts to assist its client in a matter that requires governmental approvals, in addition to rendering traditional legal services such as negotiating and drafting a lease. Distinguishing between a lawful fee and an unlawful bribe or extortion is further complicated in this case because the payment alleged to be a lawful fee was received by a firm with which Congressman Biaggi main-

tained an "of counsel" relationship and in which his son was initially employed and later a partner.

In their approach to the issue, both sides overstate their contentions. The Government asserts that the $50,000 "cannot be viewed as a simple request for compensation for services rendered" because the law firm "was already handsomely compensated by virtue of its $150,000 retainer." Brie. for Appellee at 56. Yet it is not uncommon in the practice of law for legitimate legal fees to be paid in addition to an annual retainer where a law firm handles special tasks and accomplishes significant results. In this case, it is undisputed that lawyers at the firm, particularly Ehrlich and his associate, Carlos Cuevas, Jr., performed legal tasks in negotiating the favorable terms of the Loop Drive lease and drafting its provisions. Though the work was done in a matter of days, it had to be done on an expedited basis and entailed long hours. The lawyers' efforts obtained for their client a waterside property that was essential to performance of a multimillion dollar contract and did so at an annual saving in rent of $75,000 below the City's asking price for the three-year lease. Appellants contend that the $50,000 was a proper legal fee earned by the firm—as lawful as the $5,000 bonus that Moreno gave to Cuevas, a payment the Government does not challenge.

On the other hand, appellants overstate the matter in urging that the $50,000 was solely for services already rendered and therefore could not have satisfied either the *quid pro quo* element of a bribe or the inducement element of an extortion. The law firm's bill was dated June 19, 1984. The demand for payment and Moreno's agreement on behalf of Wedtech to pay the fee must have occurred before this date.[5] After this date, important steps remained to be taken to assure Wedtech that the lease would be approved. When two members of the Board of Estimate, City Controller Harrison Goldin and Queens Borough President Donald Manes, objected at the Board's June 13 meeting to expedited consideration of the lease the next day, efforts were made to secure approval at a subsequent meeting. Biaggi called Goldin and Simon, and Richard Biaggi asked Simon to talk to Manes. As reported by Ehrlich to Moreno, the Congressman believed that Simon was at fault for not getting the lease on the Board's June 14 agenda, and he talked to Simon about obtaining approval at a subsequent meeting. In Mor-

5. Guariglia testified that, after he learned of the agreement to pay the fee, he instructed the firm to refer to the lease in the invoice so that the fee could be amortized over the term of the lease. Though it is possible that the invoice was backdated, as Ehrlich suggests, Reply Brief for Ehrlich at 6, the jury was entitled to conclude that it was sent on June 19 and that the agreement as to its amount was reached sometime earlier.

eno's words, Biaggi "had punished [Simon] ... had told him that his next election depended on Mario Biaggi's support and that he had to start moving really quick." The $50,000 bill was paid the day after the July 12 meeting of the Board of Estimate.

[22–26] It thus appears, and surely the jury was entitled to find, that the $50,000 payment had two purposes. It was sought in part as compensation for legal services rendered by the law firm. But in part it was also a payment demanded by Biaggi (and directed to his son's firm) to obtain his assistance as a public official in securing favorable action from other public officials. Biaggi expected to be influenced by the payment to render such assistance, thereby satisfying the *quid pro quo* element of bribery and he obtained the payment, at least in part, by virtue of the action he could be expected to take as a Congressman, thereby satisfying the inducement element of extortion. Only two years previously, in connection with the demand for the five percent stock interest, Biaggi had reminded Wedtech officials that he had "brought up the company to the point it was" and "could also destroy it." Thus, the issue as to the $50,000 payment becomes whether a payment may be found to constitute a bribe and an extortion where it is sought and paid for both lawful and unlawful purposes. We think it may. A valid purpose that partially motivates a transaction does not insulate participants in

an unlawful transaction from criminal liability. For example, if a Congressman demands a payment for taking official action as to a matter that requires some legal services, his demand is nonetheless extortion if he instructs the payer to retain his son's law firm for the needed legal services and to pay a sum for both the firm's legal services and his own official action. In such cases, however, the evidence must suffice to permit the jury to find beyond a reasonable doubt that the unlawful purposes were of substance, not merely vague possibilities that might attend an otherwise legitimate transaction. A client paying his law firm's legal fee does not commit bribery simply because a Congressman is "of counsel" to the firm and the client hopes the Congressman will some day be helpful. In some cases of payments to service providers who hold public office, the evidence has been deemed insufficient to show any purpose for a payment other than a lawful one. *See United States v. O'Keefe*, 825 F.2d 314, 319–20 (11th Cir.1987).

[27] In the pending case, several factors permitted the jury to find the $50,000 payment unlawful. It followed a prior extortionate demand by Biaggi and Ehrlich for a five percent stock interest. It was discussed with a Congressman while matters were pending on which the Congress-

man's assistance was urgently needed.[6] The bill was submitted just one week after the need for the Congressman's assistance became apparent. The bill was paid the day after the governmental action on which the Congressman had assisted. The bill was not accompanied by normal law firm time records and, though perhaps justified in part by the legal services rendered, was

6. Appellants dispute that Biaggi's contacts with Board of Estimate members occurred after the demand for the $50,000. They point to Moreno's testimony quoting Ehrlich as saying that a lot of extra work had been done to convince the Board members, especially Manes. But this statement was made in the context of explaining why the firm's retainer did not cover the additional services and was not necessarily made before those services were rendered nor when the extra payment was first demanded. Though the Government's statement of facts says that Ehrlich demanded the payment after the Board's approval, Brief for Appellee at 34, the fact that the check was dated just one day after the approval and was in response to an invoice dated a month before the Board's July 13 meeting permitted the jury to find that the demand was made before Biaggi garnered the needed votes.

Alternatively, appellants contend that if the demand preceded the June 19 invoice, it could not have been in anticipation of Biaggi's assistance because, they contend, the first indication that the lease would not be approved expeditiously by the Board, and that Biaggi's assistance was needed, did not occur until the Board's meeting on June 27. However, Cuevas testified that the first indication of opposition occurred on June 13, when an attempt was made to have the matter calendared for action the next day.

in addition to a substantial retainer. Under all the circumstances the jury was entitled to conclude that the $50,000 was demanded and paid, at least in part, to obtain the political services of Congressman Biaggi. Though it would be helpful in cases like this, where a payment appears to have a lawful purpose in addition to its allegedly unlawful purpose, to focus the jury's attention on the special problems presented by the possibilities of dual motivation, no special charge language was requested on this point. Appellants' complaint is solely that the evidence was insufficient for conviction, and we conclude that it suffices.

C. *Neglia's Bribery Offense.* Neglia mounts a substantial challenge to his bribery conviction on the ground that the evidence showed at most a gratuity violation and did not establish the *quid pro quo* necessary to establish a bribery violation. *See United States v. Myers*, 692 F.2d 823, 841 (2d Cir.1982), *cert. denied*, 461 U.S. 961, 103 S.Ct. 2437, 77 L.Ed.2d 1322 (1983). A public official commits a gratuity violation when he accepts something of value, here the promise of a job, "for or because of any official act performed or to be performed." 18 U.S.C. § 201(c)(1)(B). He commits a bribery violation when he accepts something of value "in return for (A) being influenced in the performance of any official act." *Id.* § 201(b)(2). Neglia contends that the job was promised "in gratitude for past services." Brief for Neglia

at 69. Testimony of Moreno, Neuberger, and Shorten supports Neglia's claim that the job was promised as a reward for prior assistance.

The Government contends, however, that the job was promised not only as a reward for past services but also in return for being influenced in the performance of official duties in the future. We have recognized, especially with respect to public officials, that evidence of the receipt of benefits followed by favorable treatment may suffice to establish circumstantially that the benefits were received for the purpose of being influenced in the future performance of official duties, thereby satisfying the *quid pro quo* element of bribery. *See United States v. Friedman*, 854 F.2d 535, 554 (2d Cir.1988), *cert. denied*, — U.S. ——, 109 S.Ct. 1637, 104 L.Ed.2d 153 (1989).[7] After learning of the job promise in the fall of 1984, Neglia acted to assist Wedtech in forestalling its decertification from the section 8(a) program. First, he showed Wedtech officials a copy of a confidential letter Congressman Parrin Mitchell had sent the SBA Administrator raising questions about Wedtech's continued section 8(a) eligibility. Next he assured Moreno that the response to a subsequent inquiry from Mitchell to the SBA would be prepared "in a form that would not hurt Wedtech." Later he told Moreno and Ehr-

7. What jury instruction is appropriate in such circumstances is considered at part V(A), *infra*.

lich that "he could help" in delaying the process of decertification.

[28] Whether this evidence suffices is a close question. This is not the usual bribery case where a public official accepts cash or some other valuable benefit that is obviously improper. Public officials regularly leave government service to return to private employment and on occasion discuss and formalize private employment opportunities while still in government service. Where that occurs, a specific conflict-of-interest statute prohibits the public official from participating in a matter in which the prospective employer has a financial interest. 18 U.S.C. § 208 (1988). Clearly Neglia's involvement in Wedtech matters after the promise of future employment at Biaggi & Ehrlich violated section 208, since, in the words of the statute, Wedtech had an "arrangement concerning prospective employment" by virtue of its promise to pay one half of Neglia's salary at the law firm. *See id.* § 208(a). But the issue here is whether the arrangement and the activity of Neglia escalated his offense beyond conflict of interest into bribery. That issue is close not only because a job promise is not unlawful under all circumstances but also because it was part of Neglia's duties as an SBA official to assist companies participating in the section 8(a) program.

[29] Nevertheless, we are satisfied that the evidence permitted the jury to find that Neglia accepted the job promise in return for being influenced in his duties. Prior to the job promise, Neglia had already rendered unlawful assistance to Wedtech, countenancing the sham stock arrangements that misrepresented Mariotta's majority interest in Wedtech and thereby perpetuated the company's participation in the 8(a) program. Some indication that Neglia understood that Wedtech had agreed to contribute to his salary at Biaggi & Ehrlich in the expectation of his continued assistance is inferable from Moreno's statement to Neglia: "We always take care of our friends when they are in government and we never forget them after they leave government." When Neglia was told by Moreno that the initial threat of an investigation by Congressman Mitchell had been "taken care of," Neglia asked, "How did you do it?" and was told, "[T]here is no need for you to know." Neglia never alerted the SBA to these clear indications of improprieties. In fact, the initial investigation was deflected after a payment by Wedtech of $50,000 to Congressman Mitchell's nephews. From all of the evidence the jury could reasonably find that the job promise was more than a gratuitous offer of post-government employment, it was a bribe accepted by Neglia in exchange for his willingness to be influenced in performing his duties for Wedtech's benefit.

[30] D. *Neglia's RICO Conviction.* Neglia challenges his conviction on the RICO substantive count on the ground that, in the circumstances of this case, his predicate acts of accepting a bribe and obstructing justice are insufficient to establish the requisite pattern of racketeering activity.[8] We agree. Predicate act 9 charged the same conduct constituting the bribery offense charged in Count 28—namely, accepting a promise of employment at Biaggi & Ehrlich, with half of his salary to be paid by Wedtech, after he left government employment. Predicate act 15 charged the same conduct constituting the obstruction of justice offense charged in Count 30—namely, making false statements "concerning Wedtech and his relationship with B & E" to a Defense Department investigator in preparation for Neglia's appearance before a grand jury.

8. With respect to the RICO substantive offense, the jury found that Neglia committed three predicate acts—bribery and accepting a gratuity (both of which were based on the promise of future employment) and obstruction of justice. Since the gratuity offense is lesser included within the bribery offense, the bribery and obstruction offenses are the only two predicate acts available to establish the RICO pattern element as to Neglia. With respect to the RICO conspiracy offense, the jury found the obstruction offense not proven, leaving only the bribery offense as a predicate act. As Judge Motley recognized, this single predicate act could not support a RICO conspiracy offense as to Neglia.

[31–33] Preliminarily, as Neglia notes, had the Government charged his false statements as a violation of 18 U.S.C. § 1001 (1988), that offense would not have been eligible for use as a RICO predicate act because section 1001 violations are not within the offenses that define "racketeering activity." *See* 18 U.S.C. § 1961(1). By charging the false statements as obstruction of justice in violation of 18 U.S.C. § 1503, the Government was able to identify an offense within the category of "racketeering activity." But the fact that an obstruction offense is eligible for use to establish a RICO pattern does not necessarily mean that it suffices in every case. The Government already charges with a heavy hand when it alleges in one count the acceptance of a bribe and in another count the false denial of that same bribe.[9] Before we will countenance a further escalation in the maximum sentence by the addition of a RICO charge, we would have to be persuaded that Congress intended that a bribe and the false denial of that same bribe would satisfy the "pattern" element of a RICO offense. *See* 18 U.S.C. § 1962(c). We are not so persuaded.

9. It should be pointed out that in framing the indictment, the Government did not seek to justify the RICO charge against Neglia solely with the two predicate acts of bribery and obstruction. The indictment charged Neglia with three other predicate acts, all of which the jury found were not proven.

[34] Despite the Government's frequent preference to charge a RICO violation whenever evidence indicates two eligible offenses, RICO was not enacted as an automatic sentence enhancement device. If Congress wants the maximum penalty for bribery to be 20 years, it may so provide, but we do not believe a prosecutor can accomplish that result by providing a bribe taker with an opportunity to deny the bribe, and then allege the bribe and the false denial as a RICO "pattern." We have recently made it clear that proof of two predicate acts "without more" does not suffice to establish a RICO pattern. *United States v. Indelicato*, 865 F.2d 1370, 1381 (2d Cir.) (in banc), *cert. denied*, — U.S. ——, 110 S.Ct. 56, 107 L.Ed.2d 24 (1989). Neglia contends that the bribe and the false denial, though obviously bearing the requisite "relationship" to each other, *see Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n. 14, 105 S.Ct. 3275, 3285 n. 14, 87 L.Ed.2d 346 (1985), lack the requisite "continuity" to establish a "pattern." That may well be so, but the more basic objection is that aggregating the bribe and its denial into a "pattern" perverts the meaning of that word, at least as it is used in the RICO statute. The "pattern" element guards against permitting RICO to be used against sporadic criminal activity. Neglia's bribe does not cease to be a sporadic offense simply because he later falsely denied committing it. If the commission of

an offense and its false denial could establish a "pattern," then *every* offense related to a criminal enterprise would be eligible for inclusion in a pattern whenever the offender falsely denied its commission. That is not what Congress intended.

The Government endeavors to draw support for its position from *United States v. Teitler*, 802 F.2d 606 (2d Cir.1986), pointing out that we there did not suggest any deficiency in a pattern established by a mail fraud offense and an obstruction of justice involving an attempt to induce false grand jury testimony. It is one thing to build a pattern out of an offense followed by an attempt to persuade grand jury witnesses to lie; it is quite a different matter to aggregate an offense and the offender's own false denial of it. In the former case, the offender extends his criminal conduct beyond a denial of wrongdoing. He enlists others into a corruption of justice. In the latter case, the offender simply maintains his innocence. The fact that his denial is false may warrant some enhancement of punishment for his criminal conduct within the statutory range established for his offense, *see United States Sentencing Guidelines* § 3C1.1 (Nov. 1989) (two-level enhancement for obstructing justice); *cf. United States v. Grayson*, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978) (enhancement for perjury committed at trial), and might, in an extreme case, warrant additional punishment for the separate offense

of obstruction. But the false denial does not convert the two offenses into a distinct RICO offense.

[35] The reversal of Neglia's RICO conviction reduces his aggregate fine by the $10,000 specifically imposed on the RICO count, since his fines were cumulated, but does not necessarily alter his term of imprisonment, since he received concurrent three-year terms on the RICO and the bribery counts. Nevertheless, as with Richard Biaggi's sentence, we think the District Judge should have an opportunity to reconsider Neglia's sentences imposed for the bribery and obstruction offenses, now that these offenses are no longer accompanied by a conviction for the more serious RICO offense.

[36] E. *Neglia's Obstruction of Justice Conviction.* Neglia contends that the evidence failed to show an obstruction of justice because his statements to a Department of Defense investigator, which constituted the offense, amounted to no more than an "exculpatory no." That doctrine has provided a defense to false statement prosecutions under 18 U.S.C. § 1001 under some limited circumstances. *See United States v. Medina De Perez*, 799 F.2d 540, 543–44 (9th Cir.1986). Even if the doctrine applies to obstruction offenses under 18 U.S.C. § 1503, a matter we do not decide, it would not assist Neglia. We have indicated that the doctrine, if applicable in this

Circuit, would have an extremely narrow scope even as to section 1001 offenses. *See United States v. Capo*, 791 F.2d 1054, 1069 (2d Cir.1986), *vacated in part on other grounds*, 817 F.2d 947 (2d Cir.1987) (in banc). In *Capo*, we expressed doubt that any statement beyond a simple "no" would fall within the exception. 791 F.2d at 1069. Neglia's responses to the investigator went beyond bare denials of wrongdoing. He manufactured a false version as to how he happened to handle work for Biaggi & Ehrlich after he left the SBA and was actively misleading with respect to his discussions with Ehrlich.

[37] F. *The Section 8(a) Fraud.* Mariotta challenges his mail fraud convictions based on the section 8(a) fraud on the ground that he was not shown to have devised a scheme to deprive a victim of money or property. Count 31 charged him with mail fraud by misrepresenting his majority interest in Wedtech before the public offering of stock, and Count 13 charged a similar misrepresentation with respect to the sham stock purchase agreements. Both counts alleged a scheme to defraud "the DOD [Department of Defense] of its right to award millions of dollars in Section 8(a) contracts." Mariotta contends that these schemes allege and were shown to involve no more than a deprivation of intangible rights, which he asserts does not constitute mail fraud after *McNally v. United*

States, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987).

McNally required a scheme intended to deprive a victim of money or property, but did not preclude deprivation of intangible property rights, as the Supreme Court made clear in *Carpenter v. United States*, 484 U.S. 19, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987). We agree with Judge Motley, *see United States v. Biaggi*, 675 F.Supp. 790, 801–02 (S.D.N.Y.1987), that Mariotta's schemes were actionable mail frauds that deprived the Department of Defense of its property right to control the award of section 8(a) contracts, even though DOD used the services of SBA to administer the section 8(a) program. *See United States v. King*, 860 F.2d 54, 55 (2d Cir.1988) (mail fraud involving public funds), *cert. denied*, — U.S. ——, 109 S.Ct. 2062, 104 L.Ed.2d 628 (1989); *Ingber v. Enzor*, 841 F.2d 450, 455–56 (2d Cir.1988) (mail fraud involving public contract awarded upon concealment of conflict of interest).

[38–40] G. *Simon's $50,000 Payment.* In his reply brief, Simon contends that the evidence was insufficient to permit the jury to find him guilty of extortion and related RICO predicate acts in connection with the $50,000 payment solicited at the Yonkers Raceway benefit for the Riverdale Hebrew Home. He argues that though Neuberger testified that the payment was demanded in June 1984, just prior to the Board of

Estimate vote on the Loop Drive lease, the only evidence that could rationally be believed beyond a reasonable doubt established that the Hebrew Home benefit attended by Simon and Neuberger occurred in November, not June. His point is that the demand for $50,000 in November could not have been misuse of his office in connection with the Loop Drive lease, which was approved by the Board of Estimate in July.

Simon's sufficiency challenge fails both because it was not preserved at trial and because of the nature of the factual issues presented to the jury. In his Rule 29 motion for a directed verdict at the close of the evidence, Simon initially raised his current claim that the Neuberger testimony about a June meeting was conclusively refuted by records and photographs showing the attendance of Simon and Neuberger at the November benefit for the Hebrew Home, not the earlier June benefit. Opposing Simon's motion, the Government took the position that if the demand for $50,000 was made in June, it related to the upcoming Board of Estimate vote in July, or, alternatively, if it occurred in November, it was nonetheless extortionate because of its relationship to Simon's continued dealing with New York City officials in connection with completion of the Loop Drive transaction and acquisition of an additional property. Counsel for Simon then told Judge Motley that if the Government was going

to argue that the meeting occurred in June, "that is an issue of fact for the jury." He concluded, "If that is what [the prosecutor] is representing to the Court, then deny my motion."

In its summation, the Government briefly adverted to Neuberger's recollection of the meeting as having occurred in June but essentially accepted the defense contention that the benefit that Simon and Neuberger attended had occurred in November. The prosecutor argued that Neuberger could not be expected to remember the precise date of the benefit, that Ceil Lewis had placed the meeting in November, and that the first check paid in response to Simon's demand was dated November 27. "It probably was the November meeting," the prosecutor acknowledged. Rather than claim that the meeting happened in June, the prosecutor argued that it made no difference whether the extortionate demand was made at a meeting in June or November because in November the Loop Drive lease, though approved by the Board of Estimate, still had not been executed and Simon's help was needed to complete the transaction. Simon's summation maintained that Simon and Neuberger had attended only the November benefit and that no demand for money had been made at that time or at any other time. His defense was that at Simon's home the following January Neuberger volunteered to make political contri-

butions. Thus, the jury was never called upon to determine whether the meeting occurred in June; the fact issue was whether at the November meeting a demand for $50,000 had been made. If it was, as the jury evidently found, there was ample evidence that it was an extortionate demand, induced by misuse of office.[10]

IV. Conduct of the Trial

All defendants allege a variety of errors occurring during the course of the trial. We consider those raising issues of arguable merit.

A. *Use of Immunized Testimony.* Mariotta and Richard Biaggi contend that the prosecution made use of testimony they had given to a New York state grand jury under grants of immunity and that Judge

10. Simon also contends that in shifting from a June meeting to a November meeting, the Government has constructively amended the indictment in violation of the Fifth Amendment. The count charging Simon with extortion of $50,000 alleged conduct beginning in mid-1984 and continuing through early 1986; the RICO counts more specifically alleged that Simon's demand for $50,000 occurred in "mid-1984." In any event, the evidence of a November demand did not constitute a modification of an essential element of the offense that amounts to an amendment of the indictment, *see United States v. Weiss*, 752 F.2d 777, 787 (2d Cir.), *cert. denied*, 474 U.S. 944, 106 S.Ct. 308, 88 L.Ed.2d 285 (1985). At most, there was a non-prejudicial variance, *see United States v. Athanasia*, 870 F.2d 809, 817 (2d Cir.1989); *United States v. Heimann*, 705 F.2d 662, 666 (2d Cir.1983).

Motley erred in ruling, without holding a so-called *Kastigar* hearing, *see Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), that the Government had adequately demonstrated its independent sources for its evidence. Mariotta and Richard Biaggi testified under grants of immunity to a grand jury empaneled by the Manhattan District Attorney. The testimony was reviewed by Judge Motley. Mariotta denied knowledge or participation in any criminal conduct at Wedtech. Richard Biaggi testified concerning two episodes of bribery. One involved efforts by Wedtech and Ehrlich to make payments, through a company known as Portatech, to General Vito Castellano of the New York State National Guard. The other involved payments on behalf of Citisource, Inc. from former Bronx County Democratic Chairman Stanley Friedman, through Portatech, to Ehrlich, who was a general in the National Guard. *See United States v. Friedman*, 854 F.2d at 547–50. Judge Motley ruled, at the conclusion of the trial, that the transcripts of the testimony given under grants of immunity and the trial record in this case demonstrated, without the need for a hearing, that the Government's case was derived from sources independent of the immunized testimony.

Preliminarily, the Government contends that appellants failed to sustain their burden of showing that their immunized testi-

mony related to the charges in this case. *See Kastigar v. United States*, 406 U.S. at 460, 92 S.Ct. at 1664; *In re Corrugated Container*, 644 F.2d 70, 75 (2d Cir.1981). Mariotta's denials disclosed no fact relevant to the instant charges. Richard's testimony concerned Wedtech and bribery, but the charges in this case did not involve the Portatech bribes. The Government's evidence made fleeting and inconsequential reference to Castellano, but not to any attempt by Wedtech to bribe him. The Castellano bribe was elicited on cross-examination by counsel for Ehrlich and Richard Biaggi.

[41] Moreover, the Government established its independent source for the one Portatech document that it used during the trial, an invoice from Portatech to Wedtech that bore Richard Biaggi's home address. This document was used to cross-examine Richard's wife concerning her knowledge of her husband's business dealings. The document was obtained from Wedtech pursuant to a subpoena issued in July 1986, before Richard's state grand jury testimony in December 1986.

[42] Appellants contend that Richard's grand jury testimony and even Mariotta's denials of wrongdoing were "used" against them in the sense that they provided the motivation for the four cooperating Wedtech witnesses to testify. In *United States v. Kurzer*, 534 F.2d 511, 517-18 (2d Cir. 1976), we recognized that the self-incrimi-

nation protection assured by *Kastigar* could be violated if it were shown that a witness was motivated to come forward with evidence against a defendant because of that defendant's immunized testimony. At the same time we pointed out that the Government should have the opportunity to persuade the trial judge that the witness would have provided adverse testimony entirely apart from the motivating effect of the immunized testimony, thus applying a *Mt. Healthy* dual motivation analysis. *See Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

In this case, the cooperating witnesses were extensively questioned during the trial as to their motivations for deciding to cooperate with the prosecution and testify against the defendants. Not one of them said they were motivated by anything that Mariotta or Richard Biaggi had said to the New York grand jury. At most, their testimony indicated that their decision to cooperate was influenced not only by the prospect of extensive federal prison terms that might result from the federal investigation of which they were aware but also by the prospect of state prison terms resulting from the investigation by the Manhattan District Attorney. Such testimony did not preclude Judge Motley from finding that the Government's evidence from the cooperating witnesses was independent of the immunized testimony, i.e., that it would

have been volunteered even if such testimony had not been given. Her finding is especially invulnerable in view of the fact that the motivation argument tendered by the appellants rests on a claim that the witnesses cooperated because they had heard generally about the state investigation, rather than any supportable claim that they had been motivated by anything that either Mariotta or Richard had said to the state grand jury.

Judge Motley did not err in finding no violation of the *Kastigar* principles nor in declining, after assessing the entire trial record, to hold a "*Kastigar* hearing."

[43] B. *Evidence of Mariotta's "Consciousness of Innocence."* Mariotta contends that it was error to exclude evidence of immunity negotiations that he contends was admissible to prove his "consciousness of innocence." Specifically, Mariotta sought to prove that the Government had offered him immunity if he would give what the Government regarded as truthful information regarding wrongdoing by other Wedtech officers and various public officials, and that Mariotta, in response to this offer, denied knowledge of any such wrongdoing, thereby "rejecting" immunity. The Government does not dispute that it made the offer, but contended before the District Court that the prosecution had rejected immunity for Mariotta after reaching the conclusion that the testimony he

would give, based on his denial of knowledge of wrongdoing, was not credible. Mariotta argued to the District Court that his denial of knowledge of others' wrongdoing, expressed to the Government at a time when admitting such knowledge would have secured him immunity from prosecution, is powerful evidence of "consciousness of innocence," tending to preclude a finding that he had such knowledge.

Initially, the Government disputes Mariotta's claim that he rejected immunity; in the Government's view, it was the Government that rejected immunity. The distinction is of no moment. Even on the Government's view of the matter, it rejected immunity because Mariotta did not come forward with incriminating evidence about Wedtech officers and public officials. But that is precisely the point Mariotta wanted the jury to know: that he had a chance to gain immunity for himself if he told the Government about the wrongdoing of Wedtech officers, and that he denied knowledge of such wrongdoing at a time when admitting he had such knowledge would have assured him immunity. The available inference is that he really lacked such knowledge, as he claimed throughout the trial. The inference is the same whether the immunity offer is viewed as "rejected" by Mariotta's inability to satisfy the Government's condition or "rejected" by the

Government's assessment that its condition was not satisfied.

The Government also contends that evidence of immunity negotiations should be excluded because of the same considerations that bar evidence of plea negotiations. Preliminarily, we note that plea negotiations are inadmissible "against the defendant," Fed.R.Crim.P. 11(e)(6); Fed.R.Evid. 410, and it does not necessarily follow that the Government is entitled to a similar shield. More fundamentally, the two types of negotiations differ markedly in their probative effect when they are sought to be offered against the Government. When a defendant rejects an offer of immunity on the ground that he is unaware of any wrongdoing about which he could testify, his action is probative of a state of mind devoid of guilty knowledge. Though there may be reasons for rejecting the offer that are consistent with guilty knowledge, such as fear of reprisal from those who would be inculpated, a jury is entitled to believe that most people would jump at the chance to obtain an assurance of immunity from prosecution and to infer from rejection of the offer that the accused lacks knowledge of wrongdoing. That the jury might not draw the inference urged by the defendant does not strip the evidence of probative force. *See United States v. DiMaria*, 727 F.2d 265, 271-72 (2d Cir.1984).

Rejection of an offer to plead guilty to reduced charges could also evidence an innocent state of mind, but the inference is not nearly so strong as rejection of an opportunity to preclude all exposure to a conviction and its consequences. A plea rejection might simply mean that the defendant prefers to take his chances on an acquittal by the jury, rather than accept the certainty of punishment after a guilty plea. We need not decide whether a defendant is entitled to have admitted a rejected plea bargain. *Cf. United States v. Verdoorn*, 528 F.2d 103 (8th Cir.1976) (approving exclusion of a rejected plea bargain offered by a defendant to prove prosecutor's zeal, rather than defendant's innocent state of mind). The probative force of a rejected immunity offer is clearly strong enough to render it relevant. Fed.R.Evid. 401. As Dean Wigmore has written:

> Let the accused's whole conduct come in; and whether it tells for consciousness of guilt or for consciousness of innocence, let us take it for what it is worth, remembering that in either case it is open to varying explanations and is not to be emphasized. Let us not deprive an innocent person, falsely accused, of the inference which common sense draws from a consciousness of innocence and its natural manifestations.

2 *Wigmore on Evidence* § 293, at 232 (J. Chadbourn rev. ed. 1979).

[44] It is a closer question whether the District Judge exceeded her discretion under Fed.R.Evid. 403 to bar relevant evidence whose probative value is outweighed by the danger of unfair prejudice, confusion, or delay. On this point we note first that the District Judge appears to have excluded the evidence primarily, if not entirely, on the ground that the evidence was not relevant, that it contributed no probative force beyond the defendant's entry of a "not guilty" plea. But Rule 403 concerns may well have influenced the exclusion ruling; the Court at one point inquired whether a hearing would be necessary to determine if an immunity offer had been made, though Mariotta's basic claim concerning the offer was not disputed. Though we recognize the latitude of a district judge in making Rule 403 determinations, we conclude that in this case, the exclusion of Mariotta's state of mind evidence denied him a fair trial.

Mariotta's basic defense was that he was unaware of any criminal wrongdoing at Wedtech, that he was an innocent victim of the machinations of the sophisticated businessmen whom he had brought into the company to handle its financial affairs. That defense was seriously in issue as to most of the charges against him, drawing considerable support from the evidence. Mariotta was a tool and die worker, with a limited ability to read and write. He dropped out of a vocational high school

after one year. At Wedtech, he tended to the production side of the business; the cooperating witnesses who testified for the prosecution handled the business and financial side.

Though the Government presented abundant evidence that Wedtech officials paid bribes to numerous officials, there was a serious dispute as to whether Mariotta knew of the bribes. The principal evidence of his knowledge of the illegal activities was the testimony of the four cooperating witnesses whose accusations were subject to considerable doubt. Neuberger acknowledged that Moreno, Guariglia, and Shorten excluded Mariotta from numerous aspects of the company's affairs, despite his role as chairman. Guariglia testified that after he became president of Wedtech, he regarded Mariotta as a nuisance. Ultimately the cooperating witnesses forced Mariotta out of the company.

One episode casts serious doubt on whether the accusers truthfully testified that Mariotta knew of their illegal activities. Moreno acknowledged that during the public offering of Wedtech stock, the company had arranged to have some of the shares purchased and "parked" on the understanding that the "purchasers" would be paid for their services and for any losses. Wedtech provided one million dollars to a consulting firm to distribute the required payments. When an outside di-

rector of Wedtech, Paul Hallingby, conducted an investigation into this stock fraud scheme in 1986, after Mariotta had left the company, Moreno,. Neuberger, Guariglia, and Shorten all sought to frame Mariotta of securities fraud by telling Hallingby that Mariotta had arranged the one million dollar payment, although, as Moreno admitted at trial, Mariotta had nothing to do with the transaction. Moreno also admitted that Neuberger, Guariglia, and he had discussed having Mariotta murdered so that Wedtech could collect as beneficiary of a $15 million policy on Mariotta's life.

With the credibility of the accusations about Mariotta's knowledge of wrongdoing seriously challenged, evidence of his denial of such knowledge in response to an opportunity to obtain immunity by admitting it and implicating others became highly significant to a fair presentation of his defense. The unfairness of preventing his presentation of evidence of his consciousness of innocence was exacerbated when the Government presented evidence of his consciousness of guilt. This consisted primarily of the action of his wife, shortly after the cooperating witnesses pled guilty, in withdrawing $3.5 million from a joint account she and her husband maintained and using it to purchase gold bars and other investments in her own name.

Where evidence of a defendant's innocent state of mind, critical to a fair adjudication of criminal charges, is excluded, we

have not hesitated to order a new trial. *See United States v. Detrich*, 865 F.2d 17 (2d Cir.1988); *United States v. Kohan*, 806 F.2d 18 (2d Cir.1986); *United States v. Harris*, 733 F.2d 994 (2d Cir.1984); *United States v. DiMaria*, *supra*. Whether the error in excluding evidence of Mariotta's innocent state of mind warrants a new trial on all charges requires further consideration. He was convicted of RICO substantive and conspiracy offenses, two bribery offenses based on the five percent stock transfer and the $50,000 Loop Drive payment, two mail fraud offenses based on the false claim of majority stock ownership at the time of the original section 8(a) application and the subsequent section 8(a) submissions after the public offering and the sham stock purchase agreements, and four tax evasion offenses based on unreported receipt of funds from the FHJ account in 1981, 1982, 1984, and 1985. The issue in dispute as to some of these counts was whether Mariotta had knowledge of the unlawful activities of other Wedtech officials and of Biaggi. That issue was central to the Loop Drive bribery, which required a finding that Mariotta knew that the payment was demanded and made for Biaggi's political influence, rather than for legal work. It was also critical to the five percent stock bribery; though Mariotta unquestionably knew of the transfer, he did not necessarily know that issuance of the stock was a bribe. On the other hand,

Mariotta's knowledge of the wrongdoing of others had little if anything to do with his mail fraud and tax offenses. There was strong evidence that he and Neuberger were 50–50 partners when he falsely claimed to the SBA that he owned two-thirds of the company, and the evidence was also clear that he was not the bona fide owner of more than 51 per cent of the stock when the sham stock purchase agreements were arranged to support an appearance of majority ownership. His guilt on the tax offenses turned on the credibility of his claim, unsupported in the evidence, that his withdrawals from the FHJ account represented repayments of loans he had made to Neuberger.

[45] Thus, the erroneous exclusion of evidence supporting the inference that Mariotta was truthfully denying knowledge of the wrongdoing of others might well have affected the jury's verdicts on the bribery counts, but was not significant with respect to the mail fraud and tax counts. The effect of the exclusion on the RICO counts is problematic. In addition to the bribery offenses, the two mail fraud offenses were charged as RICO predicate acts and found to be such by the jury in its answers to interrogatories. *See United States v. Ruggiero*, 726 F.2d 913, 922–23 (2d Cir.1984); *id.* at 925–28 (Newman, J., concurring in part). Thus, we face no issue as to whether the jury found that Mariotta

participated in the conduct of the affairs of a RICO enterprise through a pattern that included at least two predicate acts. *See Brennan v. United States*, 867 F.2d 111, 114–16 (2d Cir.1989). Our question is whether, had the excluded evidence been admitted, the jury would have found that Mariotta not only committed the two mail fraud offenses but did so as part of a pattern of racketeering activity by which he participated in the conduct of the affairs of a RICO enterprise.

[46, 47] In some circumstances, the jury's findings of two predicate acts, lawfully constituting a RICO pattern, and of the other elements of a RICO offense, will permit affirmance of a RICO conviction notwithstanding the invalidation of other predicate acts. We decline to reach that conclusion here. The allegations of bribery and extortion dominated this prosecution. If a jury, informed of the evidence supporting Mariotta's claim that he lacked knowledge of the wrongdoing of others, found that the Government had not proved such knowledge beyond a reasonable doubt and for that reason acquitted him of the bribery offenses, we think it at least questionable whether such a jury would nonetheless have convicted him of the RICO offenses, notwithstanding his commission of the two mail fraud offenses. The excluded evidence might have sufficed to persuade a jury in general not to convict him of the RICO offenses, or, more technically, might

have provided a basis for declining to find that the two mail fraud offenses constituted a RICO pattern, even though they were legally sufficient. Under the circumstances, neither the bribery nor the RICO convictions may stand.

[48] Reversal of the bribery and RICO convictions does not require reconsideration of the sentences on the mail fraud and tax counts. Unlike the situation of Richard Biaggi and Neglia, where the vacated counts carried sentences equal to sentences on other counts, Mariotta's vacated counts carried sentences far more severe than the sentences on the remaining counts.[11] Under these circumstances, we can be confident that Judge Motley carefully scaled the sentences in relation to her assessment of the severity of the offenses, avoiding the risk that the sentences on the mail fraud and tax counts might have been selected partly to reflect the seriousness of the bribery and RICO convictions.

[49] C. *Biaggi's Claim Concerning His State of Mind.* Biaggi contends that the District Court erred in excluding evidence of his state of mind concerning his belief that the shares issued to Richard Biaggi were Richard's property and not merely held by him as nominee for his

11. Mariotta was sentenced on the RICO counts to eight-year terms, on the bribery counts to five-year terms, and on the mail fraud and tax counts to two-year terms, all terms to run concurrently.

father. Specifically, he sought to offer testimony of Richard's wife that on one occasion Richard offered to use part of the proceeds from sale of the shares to repay a loan to his father, and the father refused. On another occasion, Richard offered to transfer ten percent of the shares in his name to his father, an offer his father initially refused and then agreed to only on the condition that the accountants would assure him that such a transfer was lawful, a condition that was not fulfilled.

Whether or not Judge Motley was correct in her initial ruling that this testimony was inadmissible hearsay, we agree with the Government that Biaggi explicitly declined to press for admission of this testimony in the face of the Government's assertion that admission of evidence to support a claim that Biaggi thought the stock was his son's would permit introduction of similar act evidence in rebuttal to show prior occasions when Biaggi had used his children to mask his improper transactions. The matter was discussed with Judge Motley in extended colloquies, after which she stated her understanding that counsel for the Congressman and other defense counsel "are now willing to limit the offer to the state of mind of Richard Biaggi, is that right?" to which the Congressman's counsel replied, "That is correct, Your Honor." In accordance with that understanding, Richard's wife was then permitted to testify to conversations she had with Richard

that bore on Richard's state of mind concerning ownership of the stock, but did not testify further as to what the Congressman said or as to his presence at some of the conversations. Having elected, for understandable tactical reasons, not to press for admission of the evidence to show the Congressman's state of mind, Biaggi cannot complain on appeal about the consequences of his decision.

[50] To the extent that Richard complains of a limitation on admission of some of his wife's testimony offered to show *his* state of mind concerning stock ownership, the excluded evidence bore only tangential relevance to Richard's state of mind, and the limitations were not error in view of the testimony his wife presented concerning his conversations about the stock and his offer of payment to his father.

[51] D. *Biaggi's Claim Concerning "the Meese Defense."* Biaggi contends that the District Court's rulings denying certain document requests and trial subpoenas precluded him from presenting what was referred to as "the Meese defense." Specifically, Biaggi sought to subpoena senior Executive Branch officials including Edwin Meese, who was then Attorney General of the United States and had been White House Chief of Staff at the time Wedtech was awarded its major government contracts, and to obtain documents showing the involvement of Meese

and other officials in obtaining government contracts for Wedtech. Biaggi wanted to show that since Wedtech already had the aid of the Republican White House, aid obtained by payment of large "lobbying" fees of questionable legality, the company had no need to bribe a Democratic congressman.

In view of the considerable extent to which "the Meese defense" became known to the jury, Judge Motley acted well within her discretion in rejecting requests for documents and testimony that would have greatly expanded the scope of an already wide-ranging trial. From the four cooperating witnesses, the defense established the considerable role played by Meese in assisting Wedtech in its dealings with the Executive Branch and the substantial payments made to Meese's advisor, lawyer/lobbyist E. Robert Wallach, who received $800,000 and one percent of Wedtech's stock for exercising his influence with Meese. The testimony included an allegation that Wallach had agreed, for payments of $100,000 each from Moreno and Guariglia, to use his influence with Meese to "fix" their cases and guarantee that their sentences would not include jail terms.

The prosecution made no attempt to dispute the allegations of Meese's involvement on behalf of Wedtech or the unlawfulness of that involvement. The prosecu-

tion's response in summation was that Wedtech "bribed a whole ream of people ... everyone including these people [the defendants]." The prosecution argued that Wedtech had unlawfully sought to influence both the Executive and the Legislative Branches: "[W]hatever they did with Meese was wrong, but that was done separately in the Executive Branch." The prosecution's position was clearly stated, "[O]ur office referred the allegations regarding Mr. Meese to Washington because the law doesn't permit us to prosecute our own boss." The prosecutor added, in a memorable phrase, "Meese was a sleaze."

. . .

V. Jury Charge

A. *Simon's Extortion Offenses.* In explanation of the "inducement" element of extortion, Judge Motley charged the jury as follows:

> [I]f the defendant repeatedly accepted money or benefits from representatives of Wedtech, and if the amount of money or benefits accepted could reasonably have affected the defendant's exercise of his duties, then you may find defendant induced the payment of money.

Simon specifically objected to this portion of the charge, contending that it permitted the jury to infer inducement from receipt

of entirely lawful campaign contributions.[12] The Government contends that this portion of the charge was expressly approved by a majority of this Court in *United States v. O'Grady*, 742 F.2d 682 (2d Cir.1984) (in banc). The Government's reliance on *O'Grady* is a classic example of the danger of enlisting language from an appellate opinion to serve in situations beyond the point at issue that occasioned the language.

The defendant in *O'Grady* was an official of the New York City Transit Authority. His duties included selecting vendors and assuring contract compliance. The evidence established that over a nine-year period he had accepted $30,000 worth of various forms of entertainment from Transit Authority vendors. This Court, in banc, held that it was error to charge that "the mere acceptance of benefits by a public official is extortion under color of official right if the official knew that his office was the motivation behind the giving of the benefits." *Id.* at 687. However, eight members of the Court expressed the view that, upon retrial, the jury should be instructed that it could infer inducement upon a finding of "*repeated* acceptances over a period of time of *substantial* benefits (i.e., benefits of a nature and magni-

12. A similar charge was given with respect to the offense of bribery:

> [Y]ou may infer guilt from evidence of benefits received and subsequent favorable treatment....

tude which reasonably could affect a public official's exercise of his or her duties)," *id.* at 694 (Pierce, J., concurring) (emphasis added); *id.* at 694–95 (Newman, J., concurring).

[52–55] The *O'Grady* standard, permitting an inference of inducement from repeated acceptance of substantial benefits, makes sense as applied to an appointed official who has no lawful basis for receiving cash or other benefits from those conducting business with his agency. It does not apply, however, to an elected official who may lawfully receive campaign contributions. Permitting an inference of inducement from an elected official's repeated acceptance of substantial benefits would subject every recipient of campaign contributions to conviction for extortion. When an elected official who has received campaign contributions is charged with extortion and with receiving bribes, the charge must carefully focus the jury's attention on the difference between lawful political contributions and unlawful extortionate payments and bribes. If the Government's claim concerns payments that neither the donor nor the public official contends are campaign contributions, the distinction can be easily explained. However, if the Government contends that money paid to an official as a campaign contribution was extorted or paid as a bribe, the distinction requires considerable explanation. It will not be sufficient, as

the Government suggested at oral argument, simply to tell the jury that whether a payment is a lawful campaign contribution or an unlawful extortion or bribe is a matter to be resolved based on all the evidence in the case. We need not attempt to identify all the pertinent factors that might bear on the issue, but we can suggest that they include whether the contribution was reported, whether it was unusually large compared to the contributor's normal donations, whether the official threatened adverse action if the contribution was not made, and how directly the official or those soliciting for him linked the contribution to specific official action to be taken by the official.

[56] There is a line between money contributed lawfully because of a candidate's positions on issues and money contributed unlawfully as part of an arrangement to secure or reward official action, though its location is not always clear. *See United States v. Brewster*, 506 F.2d 62, 78–83 (D.C.Cir.1974); *see generally* J.T. Noonan, Jr., *Bribes* 621–51 (1984). The laws governing extortion and bribery may sometimes be too blunt to be used as instruments to police that line, though cases may be imagined where egregious facts, submitted to a jury under careful instructions, would permit a conviction for bribery based on campaign contributions. Fortunately,

this case does not require precise delineation of that line, nor, under the circumstances, does the inapplicable charge language from *O'Grady* warrant reversal of Simon's conviction for extortion.

There was no issue put to the jury in Simon's case as to whether any payment was a lawful political contribution or an unlawful extortion or bribe. Neither the Government nor Simon contended that the Lawrence kickbacks or the job for Bittman were campaign contributions. As to the $50,000 demanded at the Yonkers Raceway, it was the Government's contention that this was a campaign contribution that Simon had extorted, but Simon defended, not on the ground that the money was a lawful contribution, but on the ground that the demand was never made and the money was never received or paid on his behalf. He denied any demand for money at the Yonkers Raceway, either in June 1984, when the Government initially alleged that he was present with Neuberger, or in November 1984, when, according to the plausible evidence in the case, he was present with Neuberger. He testified that at a January 1985 condolence call at Simon's home, Neuberger volunteered that Wedtech officials would contribute $50,000 to his campaign and that in fact $10,000 was contributed by Neuberger and $5,000 by Moreno.

The jury was never asked to decide whether this $15,000 of campaign contribu-

tions was unlawful. These contributions did not appear on the Government's list of items, based on Ceil Lewis's testimony, showing the disbursement of funds from the FHJ account to political organizations, synagogues, and restaurants, allegedly at Simon's direction. Included on the list was $10,000 in cash that Lewis testified she handed in a sealed envelope to Lawrence for delivery to Simon, a delivery Lawrence testified he made. The Government alleged that, all told, nearly $50,000 was taken from the FHJ account for Simon's purposes. Simon claimed he never demanded the $50,000 nor directed its disbursement. He specifically denied receiving $10,000 in cash in an envelope from Lawrence. The jury resolved these factual issues against him by convicting him on Count 19, which charged extortion of $50,000 in cash, contributions, and expenses.

Moreover, the jury charge on extortion included language requiring a finding that the defendant acted "unlawfully" and specifically defined extortion under color of right as the "misuse" of public office to secure payment of money. In light of the factual issues framed by the parties' contentions, these passages of the jury charge provide adequate assurance that Simon suffered no prejudice by the erroneous inclusion of the "pattern of benefits" language from *O'Grady*.

B. *Simon's Tax Offense.* Count 23 charged Simon was income tax evasion for the year 1985 by failing to pay taxes on three categories of income—the $50,000 of benefits demanded at the Yonkers Raceway, the Lawrence kickbacks, and the $9,000 worth of tile and labor furnished by Fogliano. Simon alleges error with respect to the charge concerning the Fogliano payment, specifically, the failure to charge, as requested, that if Simon intended to pay for the work done and the materials supplied by Fogliano, there is no income to report. In instructing the jury as to receipts that do not constitute reportable income, Judge Motley included "a purchase of services given on credit." The Government contends that Simon failed to object to the omission of his requested language and that the charge adequately covered Simon's point.

[57, 58] At the conclusion of the charge, Simon objected generally to the Court's failure to include requested instructions, but did not complain of the precise wording of the charge on reportable income. Generally, the proffer of a requested instruction does not excuse a defendant from the need to object specifically to its omission from the charge in order to preserve the issue for appeal. *See United States v. Friedman*, 854 F.2d at 554–56. A general complaint of failure to give requested instructions might suffice to preserve a claim

concerning a request fully considered and denied by the trial court at a charge conference and wholly omitted from the charge, but where the topic is covered in the charge, a complaint that the charge language incorrectly or inadequately covers the topic must be specifically called to the Court's attention after the charge is given. Counsel is obliged to state "distinctly" the grounds of his objection. Fed.R.Crim.P. 30.

[59] In this case, the Court charged on the topic of reportable income, but erred in failing to instruct on the defense contention. It was not Simon's point that Fogliano had extended credit, giving Simon a period of time in which to pay an incurred liability; the claim, supported by the evidence, was that Fogliano had not completed the work nor sent a bill and that Simon had no obligation to pay until the work was completed and billed. But this is precisely the type of distinction that requires a specific objection to the wording of a charge.

In the circumstances of this case, the omission of the requested charge was not plain error. As demonstrated by their conviction of Simon on the substantive counts of extortion concerning the $50,000 in benefits and the Lawrence kickbacks, the jurors clearly found that he had received reportable income in 1985. Even if a correct instruction governing the Fogliano payment had been given, there is no reasonable pos-

sibility that the verdict on the tax count would have been different.

[60] C. *Ehrlich's Defense to the Five Percent Stock Interest.* Ehrlich contends that the District Court mischaracterized his defense to receipt of half the five percent stock interest. His counsel argued in summation, and several witnesses testified, that the five percent interest was given to Ehrlich and Richard Biaggi in appreciation of the forbearance of Biaggi & Ehrlich to bill for all legal services rendered or to press for payment of bills rendered in the early days before Wedtech became successful—for "stay[ing] with us in the hard times," as one witness put it. Judge Motley characterized the defense contention to be that the stock was issued in payment for past legal services. Ehrlich contends this obscured the defense to the extent that it was based on receipt of stock for loyalty in general, rather than as compensation for particular services rendered. Though it would have been preferable to characterize the defense as counsel wished it put, *see United States v. Pedroza*, 750 F.2d 187, 205 (2d Cir.1984), *cert. denied*, 479 U.S. 842, 107 S.Ct. 151, 93 L.Ed.2d 92 (1986), Judge Motley's formulation did not affect the substantial rights of any defendant. Ehrlich's lawyer himself told the jury, at one point, that the stock had been given "in payment for past legal services rendered," The "loyalty" rationale was not so distinct from the motivation of paying for past

services that it had to be separately mentioned by the District Judge.

CONCLUSION

Each of the six appellants was fairly convicted on at least two counts. We have considered all of the many additional issues raised on this appeal and conclude that none warrants any relief beyond what we have ordered in this opinion.

With respect to Richard Biaggi, his convictions on Counts 4, 5, and 6 are reversed, and these counts are dismissed; the sentences imposed on Counts 16 and 17 are vacated, and these counts are remanded for resentencing. With respect to Peter Neglia, his conviction on Count 1 is reversed, and this count is dismissed; the sentences imposed on Counts 28 and 30 are vacated, and these counts are remanded for resentencing. With respect to John Mariotta, his convictions on Counts 1, 2, 42, 43, and 44 are reversed, and these counts are remanded for retrial.[13] In all other respects, the convictions and sentences of these defendants and of Mario Biaggi, Bernard Ehrlich, and Stanley Simon are affirmed.

13. Count numbers in this paragraph are those used in the judgments of conviction, not those in the redacted indictment submitted to the jury on which the jury verdicts were based.

APPENDIX B.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

DOCKET NUMBER

88-1530(L)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the tenth day of September, one thousand nine hundred and ninety.

- -

UNITED STATES OF AMERICA,

Appellee,

v.

MARIO BIAGGI, ET AL.,

Defendants,

STANLEY SIMON, MARIO BIAGGI, RICHARD BIAGGI, PETER NEGLIA, JOHN MARIOTTA, BERNARD EHRLICH,

Defendants-Appellants.

- -

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellant, MARIO BIAGGI.

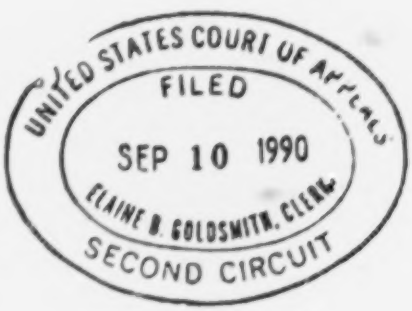
Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

by Teresa Brier
Chief Deputy Clerk



APPENDIX C.

CONSTITUTIONAL PROVISION

CONSTITUTION, AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; ...nor be deprived of life, liberty or property, without due process of law;"

Supreme Court, U.S.
FILED
FEB 13 1991
OFFICE OF THE CLERK

(2) (2) (2)

Nos. 90-785, 90-931, and 90-937

In the Supreme Court of the United States

OCTOBER TERM, 1990

STANLEY SIMON, PETITIONER

v.

UNITED STATES OF AMERICA

MARIO BIAGGI, PETITIONER

v.

UNITED STATES OF AMERICA

RICHARD BIAGGI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether two counts charging petitioner Simon with extortion and tax evasion were properly joined with other counts in the indictment.

2. Whether there was a disparity between the allegations in the indictment and the proof at trial concerning the date of an extortionate demand by petitioner Simon that constituted an impermissible amendment of the indictment.

3. Whether the court of appeals was correct in concluding that the erroneous inclusion of certain language in the jury instruction on extortion did not prejudice petitioner Simon.

4. Whether the district court properly denied petitioner Simon's motion for a new trial, which was based on new evidence suggesting that a government witness had understated the extent of his admitted tax evasion.

5. Whether the district court properly denied petitioner Mario Biaggi's request for the discovery of certain documents and the issuance of certain trial subpoenas.

6. Whether the district court correctly excluded evidence of petitioner Mario Biaggi's state of mind, after Biaggi withdrew the proffer of evidence.

7. Whether the district court properly found that the government made no use of immunized testimony given by petitioner Richard Biaggi before a state grand jury.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-785

STANLEY SIMON, PETITIONER

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UNITED STATES OF AMERICA

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RICHARD BIAGGI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 36-142)[1] is reported at 909 F.2d 662. The opinions of the district court denying petitioner Simon's motions for severance and

[1] "Pet. App." refers to the appendix to the petition in No. 90-785.

mistrial (Pet. App. 145-184, 185-221) are reported at 672 F. Supp. 112 and 705 F. Supp. 852. Other district court opinions are reported at 674 F. Supp. 1034, 675 F. Supp. 790, and 705 F. Supp. 790, 830, 848, 864, and 867.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1990. A petition for rehearing in No. 90-785 was denied on July 30, 1990. Pet. App. 143-144. A petition for rehearing in No. 90-931 was denied on September 10, 1990. 90-931 Pet. App. 71a-73a. The petition for a writ of certiorari in No. 90-785 was filed on October 29, 1990. The petitions for a writ of certiorari in No. 90-931 and No. 90-937 were both filed on December 10, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners and three others were convicted on various charges arising out of the affairs of the Wedtech Corporation, a manufacturing company that received defense contracts. Petitioners Mario Biaggi and Stanley Simon were each convicted of participating in and conspiring to participate in the affairs of the Welbilt Electronic Die Corporation (later known as the Wedtech Corporation) through a pattern of racketeering activity, in violation of 18 U.S.C. 1962 (c) and (d) (Counts 1 and 2). Mario Biaggi was also convicted on two counts of extortion, in violation of 18 U.S.C. 1951 (Counts 3 and 10), two counts of bribery, in violation of 18 U.S.C. 201(c) (1982) (Counts 4 and 11), one count of receiving a gratuity, in violation of 18 U.S.C. 201(g) (1982) (Count 5), two counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts 6 and 12), three counts of making false statements, in viola-

tion of 18 U.S.C. 1001 (Counts 7, 8, and 9), two counts of filing false tax returns, in violation of 26 U.S.C. 7206(1) (Counts 14 and 15), and one count of perjury, in violation of 18 U.S.C. 1623 (Count 18). Simon was also convicted on three counts of extortion (Counts 19-21), one count of perjury (Count 22), and one count of tax evasion (Count 23). Petitioner Richard Biaggi was convicted on one count each of aiding and abetting bribery (Count 4), receiving a gratuity (Count 5), and mail fraud (Count 6), and on two counts of filing false tax returns (Counts 16 and 17).

Mario Biaggi was sentenced to a total of eight years' imprisonment and a $242,000 fine. Simon was sentenced to a total of five years' imprisonment and a $70,000 fine. Richard Biaggi was sentenced to a total of two years' imprisonment and a $71,000 fine. Pursuant to agreements between the government and certain of the defendants, the district court also entered judgments of forfeiture for $350,000 against Mario Biaggi and $25,000 against Simon. The court of appeals affirmed on all the counts on which Mario Biaggi and Simon were convicted; it reversed Richard Biaggi's convictions on Counts 4, 5, and 6 and dismissed those counts; and it remanded the remaining counts against Richard Biaggi for resentencing. Pet. App. 142; Gov't C.A. Br. 256-263.[2]

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[2] Co-defendant John Mariotta was convicted on both RICO counts, two counts of mail fraud, four counts of tax evasion, and three counts of bribery. He was sentenced to a total of eight years' imprisonment and a $291,000 fine. A judgment of forfeiture was entered against him for $11,700,000. The court of appeals affirmed his mail fraud and tax convictions, and reversed his convictions on the RICO and bribery counts; those counts were remanded for a new trial.

Co-defendant Bernard Ehrlich was convicted on both RICO counts, two counts of extortion, two counts of mail fraud, three counts of bribery, and two counts of receiving a gratuity. He was sentenced to

1. The evidence adduced at trial, the sufficiency of which is not now in dispute, is summarized in the opinion of the court of appeals. It established that the company later known as Wedtech was a small sheet metal fabricating company located in the South Bronx area of New York City. It was founded by petitioners' co-defendant John Mariotta, who is of Puerto Rican descent. In 1975, Wedtech was accepted into the Small Business Administration's "Section 8(a)" program, under which minority-owned businesses are eligible for government contracts without competitive bidding. Pet. App. 59.

In 1978, petitioner Mario Biaggi, then a congressman from the Bronx, met Mariotta and Fred Neuberger, a co-owner of Wedtech. Biaggi was at that time a partner in the law firm of Biaggi & Ehrlich, which was retained by Wedtech for an annual retainer of $20,000. The retainer was later increased in stages to $150,000. Biaggi withdrew as a member of the law firm in 1979, after the House of Representatives adopted a rule limiting its members' outside income. The law firm bought Biaggi's interest in the firm for $320,000, payable over ten years; he remained in an "of counsel" relationship to the firm. Biaggi's son, petitioner Richard Biaggi, became a partner in the firm in 1983. Pet. App. 59-60.

Starting in 1978, Mario Biaggi contacted various government officials on behalf of Wedtech, urging that Wedtech

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six years' imprisonment and a $222,000 fine. He was also ordered to forfeit $350,000. The court of appeals affirmed each of his convictions.

Co-defendant Peter Neglia was convicted on the substantive RICO count, and one count each of bribery, receipt of a gratuity, and obstruction of justice. He was sentenced to three years' imprisonment and a $30,000 fine. His RICO conviction was reversed and dismissed, and the bribery and obstruction of justice counts were remanded for resentencing.

None of these co-defendants has filed a petition for a writ of certiorari.

be awarded defense contracts through the SBA's Section 8(a) program and loans from the Economic Development Administration. Wedtech also benefited from the services of attorney E. Robert Wallach (who frequently contacted White House ~~Chief~~ official Edwin Meese on Wedtech's behalf), former White House assistant Lyn Nofziger, and other Washington lobbyists. Pet. App. 60.

In 1982, Wedtech was awarded a $27 million contract to make small engines for the Army, and in 1984 Wedtech was awarded a $24 million contract to make pontoons for the Navy. Despite these contracts, Wedtech experienced serious financial difficulties and filed for bankruptcy at the end of 1986. Pet. App. 60-61.

The evidence against petitioners and their co-defendants came primarily from four Wedtech officials, Fred Neuberger, Mario Moreno, Lawrence Shorten, and Anthony Guariglia, who all pleaded guilty to various offenses arising from their own activities at Wedtech and who testified pursuant to grants of use immunity. Pet. App. 61. The court of appeals grouped the evidence into six categories, four of which are particularly relevant to petitioners' convictions: (1) the five percent stock interest; (2) the $50,000 Loop Drive payment; (3) the benefits to Simon; and (4) the Section 8(a) fraud.[3]

a. *The Five Percent Stock Interest.* In 1983, Wedtech made a public offering of its stock. At that time, the company issued two and one-half percent of its stock to Bernard Ehrlich and an equal percentage to Richard Biaggi. The government's evidence showed that Richard was given his shares as a nominee for his father, that the total five percent stock interest was paid to influence Congressman

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[3] The other two categories were a slush fund used by Mariotta and other Wedtech officials, Pet. App. 71-72, 126-127, and the bribery of SBA official Peter Neglia, *id.* at 72-73, 102-105.

Biaggi to use the power of his office to help secure government contracts for Wedtech, and that the payment was made in response to an extortionate demand by Congressman Biaggi, aided by Ehrlich. Both Ehrlich and Richard Biaggi later sold about one-third of their stock, each realizing more than $600,000. Pet. App. 61-62; Gov't C.A. Br. 19-20, 24-27.[4]

b. *The $50,000 Loop Drive Payment.* After Wedtech obtained the contract to make pontoons for the Navy, it needed a waterside property for testing the vessels. The company identified a site known as One Loop Drive in the Bronx, a property owned by the city of New York. In order to obtain a lease from the city, Ehrlich sought the help of petitioner Stanley Simon, then the Bronx Borough President and a member of the Board of Estimate, which was responsible for approving city leases. Simon arranged for Wedtech officials to meet with the appropriate city official, and Ehrlich negotiated a three-year lease for Wedtech at a price well below what the city had originally requested. After the lease was negotiated, in June 1984, it had to be approved by the Board of Estimate. Wedtech needed prompt approval in order to satisfy the terms of its contract with the Navy, but the matter failed to pass at the Board's June 13 meeting and was deferred until the July meeting. Mario Biaggi called Simon and demanded his assistance in having the lease approved at the next meeting. The Board approved the lease at its July 12 meeting. Pet. App. 62-63; Gov't C.A. Br. 33-34.

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[4] The court of appeals found ample evidence to establish that the stock was held by Richard Biaggi for his father, but it found insufficient evidence that Richard was aware of the unlawful nature of the transaction. It therefore reversed Richard's convictions on Counts 4, 5, and 6 (aiding and abetting bribery, gratuity, and mail fraud), but let stand his convictions for filing false tax returns. Pet. App. 88-94.

On July 13, Wedtech paid Ehrlich's law firm $50,000 for "Ports and terminal matter. Services rendered June 1984." The evidence supported the conclusion that the $50,000 was a bribe to Mario Biaggi to induce him to use his official position to secure approval for the Loop Drive Lease, and a payment in response to extortionate demands by Mario Biaggi. Pet. App. 63-64, 99-102.

c. *Benefits to Simon.* Neuberger testified that, at a benefit function at the Yonkers racetrack, Simon made an extortionate demand for $50,000 in connection with the Loop Drive lease. Simon told Neuberger that he needed help with his reelection campaign, and that he expected $75,000 or $100,000. Neuberger objected that it was illegal for a corporation to make a campaign contribution. Simon suggested making the payment in the form of donations to various charitable organizations and "some other expenses." They agreed on a figure of $50,000.[5] Neuberger then gave instructions to a Wedtech employee to release a total of $50,000 from a Wedtech account for purposes that Simon would later indicate to her. Ultimately, the major expenditures were $20,000 in charitable contributions to two synagogues, $10,000 as a political contribution to "Friends of Simon," and $10,000 in cash. The Wedtech employee gave the $10,000 in cash in a sealed envelope to Ralph Lawrence, Simon's assistant in the Bronx Borough President's office, and Lawrence gave the unopened envelope to Simon. Pet. App. 64-66; Gov't C.A. Br. 34.

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[5] Neuberger testified that the Yonkers racetrack meeting occurred in June 1984. Another Wedtech employee placed the meeting in November 1984. In the defense case, Simon introduced evidence that he had met Neuberger at the Yonkers racetrack in November 1984, not June 1984. In its summation, the government stated that the meeting at the Yonkers racetrack "probably" took place in November 1984. Pet. App. 64-65, 114; Gov't C.A. Br. 190.

Simon received three other unlawful benefits, one of which was paid by Wedtech. First, after Ehrlich told Moreno that Simon wanted Wedtech to hire Henry Bittman, Simon's brother-in-law, Wedtech hired Bittman as a payroll clerk and eventually raised his salary to $35,000. Wedtech employees testified that Bittman's work was unsatisfactory but that he was kept on the payroll because of a promise to Simon. Pet. App. 67; Gov't C.A Br. 14, 35. Second, after Simon's assistant Ralph Lawrence received a salary increase, Simon demanded one-half of all of Lawrence's subsequent salary increases as a kickback. Over the next three and one-half years, as Lawrence's salary rose to approximately $52,000, he provided half of his salary increases to Simon, for a total of about $14,000, in the form of cash, goods, and services. Pet. App. 68; Gov't C.A. Br. 43. Third, after Simon introduced Sabino Fogliano, a Bronx contractor, to various New York City officials, Fogliano complied with Simon's request to supply approximately $9,000 worth of marble and tile work for Simon's home. Fogliano never billed Simon for the work because he knew he would not be paid. Pet. App. 69; Gov't C.A. Br. 44-45.

d. *The Section 8(a) Fraud.* A company qualifies for the SBA's Section 8(a) program if it is at least 51 percent owned by "one or more socially and economically disadvantaged individuals" (15 U.S.C. 637(a)(4)(A)(i)(I)), a category that includes Hispanic Americans (15 U.S.C. 637(a)(5); 13 C.F.R. 124.105(b)). Pet. App. 70. Mariotta, who is of Puerto Rican descent, and his partner Neuberger sought to qualify Wedtech for the Section 8(a) program. To do so, they created false documents to make it appear that Mariotta owned two-thirds of Wedtech's stock, although in fact each of the two men owned half. Pet. App. 70; Gov't C.A. Br. 10.

When Wedtech became a public corporation, Mariotta and other individuals (including Mario Biaggi) devised

fraudulent stock purchase agreements to make it appear that Mariotta retained an ownership interest of over 50 percent in the company. Insiders who had received stock purported to assign their interests to Mariotta, who was obligated to pay for the shares over a ten-year period; upon Mariotta's failure to pay, the shares would revert to the insiders. Mariotta verbally agreed not to make the payments, thereby ensuring that the insiders would retain their interests in the company. Pet. App. 70-71, 111-112, 126-127; Gov't C.A Br. 28-31.

2. The court of appeals addressed a broad range of claims raised by petitioners and their co-defendants. Pet. App. 36-142. The court rejected Simon's claims that two counts were misjoined (*id.* at 75-79); that the indictment was constructively amended at trial with respect to the $50,000 extortion from Wedtech (*id.* at 115 n.10); and that the district court's extortion instruction required reversal (*id.* at 133-138). The court also considered and rejected Mario Biaggi's claims that he was unfairly denied discovery of certain documents and the issuance of certain trial subpoenas (*id.* at 131-133) and that he was erroneously denied permission to introduce state of mind evidence regarding the issuance of Wedtech shares to Richard Biaggi (*id.* at 129-131). Finally, the court considered and rejected Richard Biaggi's claim that he was entitled to a hearing concerning the claimed use of immunized testimony that he had given to a state grand jury. *Id.* at 115-119.

ARGUMENT

1. Petitioner Simon maintains (90-785 Pet. 12-20) that two counts against him, Counts 21 and 23, were improperly joined with the other counts. Count 21 charged Simon with extorting from Ralph Lawrence, his assistant in the Bronx Borough President's office, half of Lawrence's salary

increases. Count 23 charged Simon with tax evasion for the year 1985, based on his failure to report the $50,000 in benefits from Wedtech, the salary kickbacks from Lawrence, and the $9,000 of tilework from Sabino Fogliano.

The district court originally denied Simon's severance motion (Pet. App. 180-183) on the authority of Rule 8(a) of the Federal Rules of Criminal Procedure, which provides that two or more offenses may be joined if the offenses "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." During the trial of this case, the court of appeals decided *United States* v. *Turoff*, 853 F.2d 1037 (2d Cir. 1988), holding that, if a misjoinder claim is made based on multiple defendants and multiple offenses, it should be analyzed under Rule 8(b), which governs joinder of defendants.[6] Simon then moved for a mistrial, reasserting his misjoinder claim. The district court denied the motion. Pet. App. 185-221. It determined that, even after *Turoff*, Rule 8(a) remains the appropriate provision when, as here, a defendant in a multiple-defendant case objects to joinder of counts in which he alone is charged. Pet. App. 191-195. But the court also specifically decided that, even if Rule 8(b) were applicable, joinder was proper. Pet. App. 191, 197, 217-221.

Without resolving the question whether Rule 8(a) might properly apply in these circumstances, the court of appeals

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[6] Fed. R. Crim. P. 8(b) provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

agreed with the district court that joinder was proper even under Rule 8(b). Pet. App. 75-78. Petitioner's objection thus does not go to the proper legal standard; rather, it goes only to the application of Rule 8(b) to the facts of this case. This case-specific application of the Rule does not warrant review.

In any event, the courts below were correct in their application of the Rule. With regard to Count 21, although Simon's extortion of Lawrence involved a different victim, the extortion of Lawrence and the extortion of Wedtech were part of the "same series of acts or transactions." Fed. R. Crim. P. 8(b). As the court of appeals explained, Simon used Lawrence as the means of obtaining benefits from Wedtech (particularly the $10,000 payment), and "[p]roof of one scheme was helpful to a full understanding of the other." Pet. App. 77; see also *id.* at 214-221. Thus there was a sufficient relatedness of facts and participants to fulfill the "same series" requirement of Rule 8(b). *United States* v. *Attanasio*, 870 F.2d 809, 814-815 (2d Cir. 1989); *United States* v. *Turoff*, 853 F.2d at 1044.

With regard to Count 23, the core of the tax count concerned the unreported income extorted from Wedtech and from Lawrence. Pet. App. 78, 197. As to those sources, joinder was clearly appropriate. See *United States* v. *Turoff*, 853 F.2d at 1043 ("The most direct link possible between non-tax crimes and tax fraud is that funds derived from non-tax violations either are or produce the unreported income."); *United States* v. *Coppola*, 788 F.2d 303, 306-307 (5th Cir. 1986); *United States* v. *Kenny*, 645 F.2d 1323, 1344 (9th Cir.), cert. denied, 452 U.S. 920 (1981). As the court of appeals observed, moreover, since a tax count deals with all taxes evaded on a single year's income, it also was not error to join the tax count simply because it included the "relatively small amount of income from the unrelated trans-

action involving Fogliano." Pet. App. 78. Accordingly, Simon's motion for a severance was properly denied.

2. Petitioner Simon also contends (90-785 Pet. 30-34) that the proof at trial concerning his extortion of Wedtech produced an impermissible amendment of the indictment. His claim relates exclusively to the date on which he made an extortionate demand of Wedtech official Neuberger for $50,000 in exchange for Simon's influence on behalf of the Loop Drive lease. Count 1 alleged that Simon's demand for $50,000 occurred "[i]n or about mid-1984." C.A. App. A155. Count 1 also alleged, in Racketeering Act 4, that Simon extorted the money "[b]eginning in or about mid-1984 and continuing up to and including early 1986." C.A. App. A166. Count 19, the substantive extortion count concerning the $50,000, similarly alleged that the extortion occurred "[b]eginning in or about mid-1984 and continuing up to and including early 1986." C.A. App. A196. Although Neuberger testified that Simon first made the extortionate demand at the Yonkers Raceway in June 1984, the government ultimately acknowledged, on the basis of other evidence, that the Yonkers racetrack meeting "probably" occurred in November 1984. See note 5, *supra*. Simon argues that the government thereby constructively amended the indictment, in violation of the Fifth Amendment. The court of appeals correctly rejected this argument.

As the court of appeals concluded (Pet. App. 115 n.10), the evidence that the demand was made in November did not reflect a modification of an essential element of the offense, and thus did not amount to an amendment of the indictment. See *United States* v. *Miller*, 471 U.S. 130, 136, 138-140 (1985); *United States* v. *Attanasio*, 870 F.2d at 817; *United States* v. *Begnaud*, 783 F.2d 144, 147 & n.4 (8th Cir. 1986); *United States* v. *Weiss*, 752 F.2d 777, 787 (2d Cir.), cert. denied, 474 U.S. 944 (1985). Simon was convicted of the offense charged in the indictment, extortion under

color of official right. The evidence showed the participants, the victim, and the nature of the extortionate scheme to be precisely those charged in the indictment. Although there was a difference between Neuberger's testimony and the defense evidence regarding the date of the meeting between Neuberger and Simon, the date on which an extortion occurs is not an essential element of a federal extortion offense. See *United States* v. *Leibowitz*, 857 F.2d 373, 379 (7th Cir. 1988), cert. denied, 489 U.S. 1088 (1989); *United States* v. *Heimann*, 705 F.2d 662, 665-666 (2d Cir. 1983).[7]

As the court of appeals concluded, the discrepancy in the proof regarding the date of Simon's demand did not result in an amendment of the indictment. Pet. App. 115 n.10. Indeed, the language of the indictment, alleging that the extortion took place "in or about mid-1984," and that it continued into 1986, was broad enough to cover an initial demand occurring either in June or November 1984. Although the evidence showed that the date of the offense was probably later than the government witness recalled, there was no doubt as to the nature of the offense charged, and Simon could not have been misled as to the nature of the charge against him as a result of the confusion as to the date of the meeting. Petitioner's claim thus is not meritorious. *United States* v. *Attanasio*, 870 F.2d at 817; *United States* v. *Nersesian*, 824 F.2d 1294, 1323 (2d Cir.), cert. denied, 484 U.S. 957 (1987); *United States* v. *Heimann*, 705 F.2d at 666-667.

3. Petitioner Simon further contends (90-785 Pet. 20-24) that the district court erred in that portion of the jury

[7] Simon suggests that occurrence of the meeting in June was an essential element of the extortion because a vote approving the Loop Drive lease occurred in July. Pet. 30, 32, 34. As the court of appeals noted, however, the Loop Drive lease had not been executed in November, and Simon's help was still needed to complete the transaction. Pet. App. 114-115.

instructions in which it explained the "inducement" element of extortion. Simon argues that that portion of the charge permitted the jury to infer inducement from the receipt of entirely lawful campaign contributions.

The charge at issue was as follows (Pet. App. 133):

> [I]f the defendant repeatedly accepted money or benefits from representatives of Wedtech, and if the amount of money or benefits accepted could reasonably have affected the defendant's exercise of his duties, then you may find defendant induced the payment of money.

The court of appeals found this language erroneous in the context of this case, explaining why it was inappropriate here, despite the fact that the same language had been approved in another case, *United States* v. *O'Grady*, 742 F.2d 682, 694-695 (2d Cir. 1984) (en banc) (concurring opinions) (Pet. App. 135):

> The *O'Grady* standard, permitting an inference of inducement from repeated acceptance of substantial benefits, makes sense as applied to an appointed official who has no lawful basis for receiving cash or other benefits from those conducting business with his agency. It does not apply, however, to an elected official who may lawfully receive campaign contributions. Permitting an inference of inducement from an elected official's repeated acceptance of substantial benefits would subject every recipient of campaign contributions to conviction for extortion.

The court went on, however, to hold that the instructional error did not require the reversal of Simon's conviction, because "[t]here was no issue put to the jury in Simon's case as to whether any payment was a lawful political contribution or an unlawful extortion or bribe." Pet. App. 137. As the court explained, neither the prosecution nor Simon con-

tended that the Lawrence kickbacks or the job for Bittman were campaign contributions. *Ibid.* To be sure, the government contended that the $50,000 Simon demanded at the Yonkers Raceway was a campaign contribution that Simon extorted. Simon's defense, however, was not that the payment was a lawful contribution but rather that the demand was never made and the money never received on his behalf. *Id.* at 137-138. Furthermore, the court noted, the entire instruction on extortion included language that required a finding that the defendant had acted "unlawfully" and language that defined extortion under color of right as the "misuse" of public office. Pet. App. 138; see Gov't C.A. Br. 248-249. Particularly "[i]n light of the factual issues framed by the parties' contentions, these passages of the jury charge provide adequate assurance that Simon suffered no prejudice by the erroneous inclusion of the 'pattern of benefits' language from *O'Grady*." Pet. App. 138. The court of appeals was therefore correct in determining that, on the facts of this case and in the overall context of the jury instructions, the challenged portion of the charge does not require reversal.[8]

4. Petitioner Simon claims (90-785 Pet. 24-29) that the district court erred in denying without a hearing his motion for a new trial, which was based on a claim of new evidence concerning government witness Sabino Fogliano. This contention is insubstantial.

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[8] Because the court of appeals found that there was no issue about whether the extorted payments were lawful campaign contributions, this case is unlike *McCormick* v. *United States*, No. 89-1918 (argued Jan. 8, 1991), in which petitioner claimed that particular payments made to him were legitimate campaign contributions. Simon challenges the court of appeals' analysis of the trial record (90-785 Pet. 23), but the court of appeals' reading of the record is well supported and does not merit review.

The newly discovered evidence advanced in support of Simon's new trial motion was that, although Fogliano testified about his own tax evasion and admitted that he had failed to report $600,000 to $800,000 over several years, the full extent of his actual tax evasion was not revealed. After the conclusion of the trial in this case, Fogliano pleaded guilty in New York State court to charges of evading income taxes of $8.5 million. Pet. App. 69-70. Simon argues from this fact that Fogliano lied on the witness stand, that the federal prosecutors probably knew of his perjury, and that, had the jury known the full extent of Fogliano's tax evasion, it may have discounted his testimony and acquitted Simon.

The general standard for granting a new trial based on newly discovered evidence is that the new evidence would probably lead to an acquittal. *United States* v. *Steel*, 759 F.2d 706, 713 (9th Cir. 1985); *United States* v. *Gonzalez*, 748 F.2d 74, 77 (2d Cir. 1984); *United States* v. *Gilbert*, 668 F.2d 94, 97 (2d Cir. 1981), cert. denied, 456 U.S. 946 (1982). If the new trial motion is based on the use of perjured testimony, however, and the government knew or should have known of the perjury, then a new trial should be granted "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States* v. *Agurs*, 427 U.S. 97, 103 (1976); *United States* v. *Petrillo*, 821 F.2d 85, 88 (2d Cir. 1987).

The district court in this case found that petitioner's motion failed under either of these standards. 705 F. Supp. at 864, 865-866. The court observed that the government had notified the defense that Fogliano was a tax evader before trial, that the government brought out Folgiano's tax evasion and the ongoing state investigation on direct examination, and that the defense pursued the tax evasion on cross-examination. *Id.* at 866. The jury thus clearly knew that Fogliano was a tax evader, and that his crime involved

a substantial amount of money. The district court concluded (*ibid.*):

> It is disingenuous to suggest that had the jury known Fogliano was a bigger tax evader than he was made out to be they would have acquitted Simon of the charges against him. Such evidence, had it been adduced at trial, would have been merely "'*additional* evidence tending *further* to impeach the credibility of a witness whose character had already been shown to be questionable;' it could hardly have transformed the jury's image of [the government's witness] from paragon to knave."

The new evidence was cumulative and related only to the impeachment of the witness, rather than to Simon's guilt or innocence. Moreover, there was abundant independent evidence, apart from the testimony of Fogliano, that supported Simon's conviction. Gov't C.A. Br. 204-205. The district court was therefore correct in finding that the new evidence did not warrant a new trial under either standard.[9]

5. Petitioner Mario Biaggi claims (90-931 Pet. 25-31) that the district court's refusal to order the production of certain documents and the issuance of certain trial subpoenas precluded him from presenting his defense. He sought to subpoena several government officials, including Edwin Meese, who had been a White House official at the time Wedtech was awarded its major government con-

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[9] With regard to Simon's claim that the district court should have held an evidentiary hearing to establish the extent to which the government knew the full amount of Fogliano's tax evasion, the district court found that the claim of government misconduct was entirely speculative, unsupported by any firm evidence, and "wholly insufficient" to require an evidentiary hearing. 705 F. Supp. at 866. Particularly in light of the fact that at the time of trial the state investigation was still in progress, there is no basis for Simon's assertion that the federal prosecutors must have known the exact extent of Fogliano's tax evasion.

tracts, and he sought to obtain documents that would show the involvement of Meese and other officials in obtaining contracts for Wedtech. The "Meese defense" was designed to show that Wedtech already had the aid of senior Republican Executive Branch officials and therefore had no need to bribe a Democratic congressman. Pet. App. 131-133.

The short answer to this contention is that, as the court of appeals explained, petitioner was allowed ample opportunity to present this defense to the jury. The district court's refusal to order production of the requested documents and testimony was well within its discretion to prevent the expansion of an already lengthy trial into cumulative and irrelevant matters. Pet. App. 132. See also 705 F. Supp. at 849. The court of appeals pointed out that the defense was able to establish through the four cooperating witnesses "the considerable role played by Meese in assisting Wedtech in its dealings with the Executive Branch and the substantial payments made to Meese's advisor, lawyer/lobbyist E. Robert Wallach, who received $800,000 and one percent of Wedtech's stock for exercising his influence with Meese." Pet. App. 132. The court of appeals also noted that the prosecution never disputed the allegations of Meese's involvement on behalf of Wedtech. The prosecution argued that Wedtech had unlawfully sought to influence numerous people in both the Executive and Legislative Branches. *Id.* at 132-133. As the district court repeatedly observed, the documents and testimony sought to be compelled by petitioner would at most implicate others in the unlawful dealings with Wedtech; they would not exonerate petitioner. See, *e.g.*, 675 F. Supp. at 811; 674 F. Supp. at 1036-1037.

The handling of discovery requests is generally committed to the discretion of the district court. The record in this case demonstrates that the court did not abuse that discretion in making its rulings and that petitioner suffered no

prejudice to his substantial rights. See *United States* v. *Paiz*, 905 F.2d 1014, 1027 (7th Cir. 1990); *United States* v. *Balk*, 706 F.2d 1056, 1059-1060 (9th Cir. 1983).

6. Petitioner Mario Biaggi also claims error (90-931 Pet. 18-24) in the district court's exclusion of evidence that he asserts would have shown his belief that the Wedtech stock that was issued to his son was in fact his son's property. Specifically, Mario Biaggi proffered the testimony of his daughter-in-law, Richard's wife, that on one occasion Richard offered to use part of the proceeds from sale of the shares of stock to repay a loan from his father. At another time, Richard purportedly offered to make a gift to his father of ten percent of the shares; his father initially declined the offer and agreed to accept the gift only if his accountants could assure him such a transfer would be lawful. Pet. App. 129-130; Gov't C.A. Br. 144.

Mario Biaggi argues that the district court's refusal to allow this testimony deprived him of critical defense evidence; he further argues that the court of appeals departed from its own precedents allowing such state-of-mind evidence when it affirmed the district court's ruling. In fact, as the court of appeals made clear, petitioner himself withdrew his proffer of this evidence, making a tactical decision not to introduce it once he realized that it would open the door to the prosecution's rebuttal evidence showing other occasions on which Biaggi had used his children to mask his own improper transactions. Pet. App. 130. Contrary to petitioner's contention (90-931 Pet. 19 n.3), the record is clear that he disavowed any intention to introduce the evidence. See Gov't C.A. Br. 147-152. As the court of appeals concluded, "[h]aving elected, for understandable tactical reasons, not to press for admission of the evidence to show the Congressman's state of mind, Biaggi cannot complain on appeal about the consequences of his decision." Pet. App. 131.

7. Finally, petitioner Richard Biaggi contends (90-937 Pet. 11-15) that it was error for the district court to find, without holding a so-called *Kastigar* hearing (*Kastigar* v. *United States*, 406 U.S. 441 (1972)), that the government had adequately shown that it did not use the testimony Richard Biaggi gave to a New York state grand jury under a grant of immunity. This claim is incorrect.

The district court explained in a post-trial opinion that it had earlier decided to postpone the *Kastigar* hearing until after trial. After trial, however, the court concluded that the trial had obviated the need for such a hearing. After reviewing Richard Biaggi's immunized grand jury testimony and the trial record, the court found it to be clear that the government's case "was obtained from sources wholly independent of * * * Richard Biaggi's grand jury testimony." 705 F. Supp. at 867. In a thorough discussion of the issue, the court of appeals agreed with the district court that review of the immunized testimony and the trial record fully demonstrated that the government had made no use of Richard Biaggi's immunized testimony. The court emphasized that the charges in this case did not even relate to the immunized testimony. Pet. App. 115-119. No further review of this essentially factual determination is warranted.

As the court of appeals explained, Richard Biaggi's immunized testimony in the state grand jury concerned two episodes of bribery, both involving payments through a company called Portatech, to a General Castellano in the New York National Guard and to Bernard Ehrlich, who was also a general in the National Guard. The charges in this case did not concern the Portatech bribes. Indeed, there was only one brief reference to Castellano in the government's case (described by the court of appeals as "fleeting and inconsequential"), and that reference did not concern any attempt to bribe Castellano. Pet. App. 116-117. Additionally, the government used one Portatech document in

its case (to cross-examine Richard Biaggi's wife about her knowledge of her husband's business dealings), but the document was obtained from Wedtech pursuant to a subpoena issued before Richard Biaggi's grand jury testimony. Pet. App. 117.[10]

In short, the purpose of a *Kastigar* hearing was fully satisfied by the trial court's review of petitioner's grand jury testimony and the entire trial record of this case. From that review, both the district court and the court of appeals were satisfied that the government met its burden of showing that it had not made any use of Richard Biaggi's immunized testimony. That case-specific determination is correct and does not warrant further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[10] Petitioner also argued below that his grand jury testimony was indirectly used against him by providing the motivation for the cooperation of the four Wedtech witnesses who testified for the government. The court of appeals properly rejected that claim. As the court explained, the witnesses were questioned extensively at trial about their motivation for cooperating with the government, and none of them testified they were motivated by anything Richard Biaggi had said to the state grand jury. Pet. App. 118-119.

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